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No. 20,428

**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

ARTHUR ANDERSON and CLATSOP  
FISHERIES, INC., an Oregon corporation,

*Appellants,*

v.

GENE R. NADON, DOROTHY IRENE  
NADON, and JATABORO CORPORATION,  
a corporation,

*Appellees.*

**BRIEF OF APPELLANTS**

*Appeal from the United States District Court  
for the District of Oregon*

FILED

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FRANK H. SCHMID, CLERK

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**United States**  
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v.

GENE R. NADON, DOROTHY IRENE  
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*Appellees.*

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**BRIEF OF APPELLANTS**

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*Appeal from the United States District Court  
for the District of Oregon*

---

**JURISDICTION**

This appeal arises out of limitation of liability proceedings, 46 U.S.C. § 183 *et seq.*

Respondent-appellant Clatsop Fisheries, Inc., was the owner of the F/V BETTY which was lost at sea after a collision with the F/V EAGLE on December 6, 1964 (R. 20). Respondent-appellant Arthur Ander-

son is the president of Clatsop Fisheries, Inc. and was the skipper of the F/V BETTY (R. 22). Petitioners-appellees allege that they are the owners and operators of the F/V EAGLE (R. 1).

On June 4, 1965, the petitioners filed a "Petition for Exoneration from or Limitation of Liability as Owners of F/V EAGLE" in Admiralty in the United States District Court for the District of Oregon, alleging, *inter alia*, the fact of the collision between the F/V EAGLE and the F/V BETTY on December 6, 1964, and that the F/V EAGLE was within the District of Oregon (R. 1). The marshal served the Petition and Monition on respondents-appellants at Astoria, Oregon, on June 5, 1965 (R. 15, 16).

Respondents-appellants filed their Claim and Answer (R. 17). Respondents-appellants also filed a Stipulation and Motion (R. 20) requesting leave to proceed with a determination of petitioners' liability for the loss of the F/V BETTY in the Circuit Court of the State of Oregon for Clatsop County, agreeing to a determination of petitioners' right to limitation by the District Court. Clatsop Fisheries also filed a priority consent (R. 27) agreeing to payment of all claims before any payment to Clatsop Fisheries, Inc.

The motion to dissolve the injunction was heard on August 3, 1965 (Vol. II, R.).

On August 10, 1965, the court entered its Order (R. 29) denying the Motion of respondents. On August 23, 1965, respondents filed a Notice of Appeal (R. 31).

The District Court had jurisdiction by virtue of the provisions of 46 U.S.C. § 185.

This Court has jurisdiction by virtue of the provisions of 28 U.S.C. § 1292 (a) (1) and (3).

### **STATEMENT OF THE CASE**

Individual petitioners allege that they are residents of Clatsop County, Oregon, and part owners of the F/V EAGLE. The home port of the F/V EAGLE is Astoria, Oregon. The petitioner Jataboro Corporation alleges that its principal place of business is located in Astoria, Clatsop County, Oregon (R. 1-2) and that it also is an owner of the F/V EAGLE.

At the time of the collision between the F/V EAGLE and the F/V BETTY the individual respondents were the only persons aboard the F/V BETTY.

The Order for Monition and Monition require all claimants to appear before July 13, 1965, and assert their claims.

The marshal's returns show that the respondents were all served in Clatsop County, Oregon (Astoria and Warrenton) (R. 13-16).

The only claim filed is that of appellants Clatsop Fisheries, Inc. and Arthur Anderson (R. 17). The crew of the F/V BETTY, Riley Linville and Uno Winters, have renounced any claim against the F/V EAGLE (R. 23, 24). Clatsop Fisheries seeks reimbursement of amounts paid to Linville and Winters.



The appellants requested that Clatsop Fisheries be permitted to proceed against the petitioners in the Circuit Court of the State of Oregon in Clatsop County. Appellants agreed that if Clatsop Fisheries were so allowed to proceed, the petitioners' right to limitation would not be litigated in the state court (R. 21).

Upon exception by the petitioners (Vol. II, R. 4-6) that there were multiple claims and an inadequate fund, Clatsop Fisheries, Inc. filed a priority consent agreeing that the three small claims for crew members could be paid in full by the District Court out of the limitation fund (R. 27-28).

The District Court refused to permit Clatsop Fisheries, Inc. to proceed with its claim for loss of the BETTY against the petitioners in the state court (R. 29, 30) and appellants request that the District Court be ordered to allow Clatsop Fisheries, Inc. to proceed in the state court.

### **SPECIFICATION OF ERROR**

The District Court erred in refusing to allow Clatsop Fisheries, Inc. to prosecute in the state court its claim against petitioners for loss of the BETTY.

### **SUMMARY OF ARGUMENT**

The appellants' stipulation agreeing to determination of the right to limitation in the District Court, the disclaimers of crew members, and the priority consent of the vessel owner, adequately protect petitioners' right

to limitation, thus entitling the single remaining claimant, Clatsop Fisheries, Inc., to pursue its claim against petitioners in the common law forum.

## ARGUMENT

### State Court Jurisdiction

Admiralty jurisdiction has never been held to be within the exclusive realm of the United States District Court sitting in admiralty.<sup>1</sup>

The "saving to suitors" clause was enacted in 1789 as part of the Judiciary Act and is as viable today as it has ever been.<sup>2</sup>

The "saving to suitors" clause was discussed by the Supreme Court in *Madru a v. Superior Court*, 346 U.S. 556 (1954). In the *Madru a* case, the power of the California courts to order partition of a ship was brought into question. In upholding the jurisdiction of the state court, the Supreme Court, Mr. Justice Black speaking, said:

"Admiralty's jurisdiction is 'exclusive' only as to those maritime causes of action begun and carried on as proceedings *in rem*, that is, where a vessel or thing is itself treated as the offender and made

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<sup>1</sup> The Constitution of the United States provides that: "The judicial Power shall extend \* \* \* to all Cases of admiralty and maritime Jurisdiction; \* \* \*" U.S. Const. Art. III, § 2.

<sup>2</sup> "The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

"(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

"(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize." 28 USC § 1333.

the defendant by name or description in order to enforce a lien." 346 U.S. at 560.

The Oregon Supreme Court has long recognized that its jurisdiction is limited to *in personam* claims. See *Portland Butchering Co. v. The WILLAPA*, 25 Or. 71, 34 Pac. 689 (1893).

In this case Clatsop Fisheries, Inc. desires to institute an action against the owners of the F/V EAGLE, not the F/V EAGLE herself. Such an action would be *in personam* and within the jurisdiction of the state court.

Appellants have found no authority for the proposition that there is an exception to the state court's *in personam* jurisdiction in collision cases. Furthermore, there is no reason to suspect that the Oregon courts will not properly apply maritime law to this case. The Oregon courts decide longshoremen versus shipowner cases on the basis of the maritime law announced by the United States Supreme Court. See e.g. *Lang v. Coastwise Line*, 206 Or. 667, 294 P.2d 341 (1956). Actions brought by seamen against shipowners are decided on the basis of federal maritime law, i.e., the Jones Act. See e.g. *Lazari v. States Marine Corp.*, 220 Or. 379, 349 P.2d 857 (1960).

The Circuit Court of Clatsop County, Oregon, is competent to hear and determine an action brought by the owners of the F/V BETTY against the owners of the F/V EAGLE.<sup>3</sup>

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<sup>3</sup> Although not a *forum non conveniens* question, it is to be noted that the Clatsop County Circuit Court sits in Astoria and is thus the convenient forum for the trial of this case.



### The Limitation Act

The Limitation Act does not have for its purpose the denial of the injured party's right to a jury trial in a state court forum competent to hear the case. It has for its purpose limitation of an owner's liability to his investment in the *res* and, where the *res* is inadequate, equitable apportionment among all claimants. *Lake Tankers Corporation v. Henn*, 354 U. S. 147 (1957); *Langnes v. Green*, 282 U.S. 531 (1931).

In the instant case, therefore, if the limitation rights of the owners of the F/V EAGLE can be assured and if there is no question of proper apportionment among claimants, the owner of the F/V BETTY should be allowed to proceed in the state court.

The only possible claimants, as appears by the petition for limitation, are the owner of the F/V BETTY and her Master and two-man crew. The time for filing claims expired on July 13, 1965 (R. 9). The owner, Clatsop Fisheries, Inc. and the Master, Arthur Anderson, appeared. Clatsop Fisheries, Inc. as trustee, settled with the crew and holds their claims (R. 25, 26). The crew of the F/V BETTY expressly disclaims any personal claim against the F/V EAGLE or her owners (R. 23, 24).

The appellants have agreed:

"1. Respondents will not claim as *res judicata* the personal liability of petitioners established in the State Court action but agree that this Court may subsequently determine the issue of petitioners' privity and knowledge and right to limit their

liability to their interest in the F/V EAGLE and her cargo as by Revised Statutes of the United States may be allowed; and

"2. Respondents will not seek to enforce and collect any judgment against petitioners herein which respondents may obtain in the aforesaid Clatsop County Circuit Court except in and through these proceedings after due appraisal of the F/V EAGLE and the granting or denying of the Petition for Exoneration from or Limitation of Liability." (R. 21, 22)

Clatsop Fisheries, Inc. has further agreed:

"\* \* \* that any claims filed on behalf of Uno Winters and Riley Linville, crew members aboard the F/V BETTY, or on behalf of Arthur Anderson, Master of the F/V BETTY, as such claims may be fixed by this Honorable Court, should be deducted and paid out of available funds before the payment of any Judgment recovered by respondent Clatsop Fisheries, Inc. in its proposed State Court action." (R. 27)

As further assurance to petitioners of their limitation rights, appellants agreed through their counsel:

"\* \* \* We represent all of the claimants and we are prepared to file either a priority consent that those other three small claims may be paid in full out of any limitation fund, or we are prepared, if your Honor feels it is necessary, to disclaim completely the other three claims, which are all very minor, small claims." (Vol. II, R. 4)

It thus appears that the District Court is authorized by stipulation to pay up to the full amount of the

losses suffered by the Master and crew of the F/V BETTY and if limitation is ultimately allowed, the liability of petitioners will be limited to the value remaining. If consideration of the claims of the Master and crew of the F/V BETTY is any threat to petitioners' limitation rights, appellants have agreed that the claims be disregarded, leaving only the claim of Clatsop Fisheries, Inc. Every possible right granted by the Limitation Act to petitioners is protected and guaranteed.

Concourse is a prime function of limitation proceedings to provide for equitable apportionments of an inadequate fund, but where there is no need for concourse, either because there is only one claimant or because there is no dispute among the claimants as to amounts or payment, as here, or one claimant agrees to full payment, as here, the petitioner is not entitled to concourse. As the Supreme Court stated:

"The State proceeding could have no possible effect on the petitioner's claim for limited liability in the admiralty court and the provisions of the Act, therefore, do not control. *Langnes vs. Green*, 282 U.S. 531, 539-540. It follows that there can be no reason why a shipowner, under such conditions, should be treated any more favorably than an airline, bus, or railroad company. None of them can force a damage-claimant to trial without a jury. They, too, must suffer a multiplicity of suits. Likewise, the shipowner, so long as his claim of limited liability is not jeopardized, is subject to all common-law remedies available against other parties in damage actions. The Act, as we have said,



was not adopted to insulate shipowners from liability but merely to limit it to the value of the vessel and the pending freight. It is contended that *Maryland Casualty Co. vs. Cushing*, 347 U.S. 409, is to the contrary. While there was no opinion of the Court in that case, it involved an alleged clash between Louisiana's direct action statute and the Act. The majority concluded there was no clash. The amount of the claims there far exceeded the value, if any, of the vessel and the pending freight. The language in one opinion to the effect that *concur-sus* is 'the heart' of the limitation system therefore refers to those cases where the claims exceed the value of the vessel and the pending freight. In that event, as we have pointed out, the *concur-sus* is vital to the protection of the offending owner's statutory right of limitation. But this is not to say that where *concur-sus* is not necessary to the protection of this statutory right, that it is nonetheless required." *Lake Tankers Corporation v. Henn*, 354 U.S. 147 at 153, 154.

There are two matters that may ultimately have to be decided by the Admiralty Court.<sup>4</sup> The sequence of decision of these two matters is probably not important. One matter is whether the owners of the F/V EAGLE are entitled to limitation and, if so, the value of the F/V EAGLE. Appellants contest both the right to limitation and valuation but concede the Admiralty Court's

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<sup>4</sup> These matters are whether limitation will be allowed and the valuation of the F/V EAGLE. It is to be noted that this court has approved an order permitting a state court determination of liability and the value of the petitioner's vessel. *Red Bluff Bay Fisheries, Inc. v. Jurjev*, 109 F.2d 884 (C.A. 9, 1940). Appellant does not seek such a broad order.

jurisdiction to decide the two issues. Appellants desire and are entitled to try to a jury the issue of the amount of damages to Clatsop Fisheries, Inc. occasioned by the loss of the F/V BETTY and the petitioners' liability for the loss. The question of the amount which Clatsop Fisheries, Inc. will ultimately realize on any judgment entered in the state court will, of course, depend on the valuation of the F/V EAGLE and if the valuation is less than the judgment, whether limitation is allowed. The District Court may never have to decide the merits of the limitation claim because if Clatsop Fisheries recovers a judgment less than the stipulated value (\$35,000), the right to limitation and valuation would become moot.

In its opinion, the District Court found that the "statutory scheme" would be violated by granting appellant's request to proceed in the state court (R. 29). The court relied on *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546 (C.A. 5, 1960).

In the *Pershing Auto* case there were four claimants seeking a grand total of \$558,000. The vessel involved was a total loss. Two of the claimants sought leave to proceed in the state court; two did not do so. There were no disclaimers executed, as here, by crew members Linville and Winters. There was no priority consent filed, as here, by Clatsop Fisheries, Inc.<sup>5</sup> As a

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<sup>5</sup> In the case of *Moran Transportation Corporation v. Adm'x of Vitorio Mellino*, 185 F.2d 386 (C.A. 2, 1950), the court held that the filing of a priority consent assured apportionment of the fund, therefore entitling the claimant to liquidate her claims in the state court.

matter of fact, the Court of Appeals, speaking through Judge Brown, after deciding it would be improper to dissolve the lower court's injunction, concluded its opinion by noting that after limitation was granted or denied in admiralty, the claimants would be allowed to proceed, if they desired, with a jury trial in the state court.<sup>6</sup> Clatsop Fisheries, Inc. wishes to have the state court trial first as is its right confirmed by *Lake Tankers Corporation v. Henn*, *supra*, and *Langnes v. Green*, *supra*.

### CONCLUSION

The order should be vacated and the case remanded with instructions to allow Clatsop Fisheries, Inc. to proceed with its state court action against owners of the F/V EAGLE for loss of the F/V BETTY.

GRAY, FREDRICKSON & HEATH

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Attorneys for Appellants

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<sup>6</sup> This right to an eventual jury trial in the state court may or may not be acknowledged by the trial court in this case. See e.g. *Petition of Sause Bros. Ocean Towing, Inc.*, 193 F. Supp. 14 (D.C. Or., 1960).



**CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

**FLOYD A. FREDRICKSON**  
Attorney



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*Appeal from the United States District Court  
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**BRIEF OF APPELLEES**

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*Appeal from the United States District Court  
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**SUPPLEMENTAL STATEMENT OF THE CASE**

On December 6, 1964, a collision occurred between the FV EAGLE and the FV BETTY upon the high seas in international waters. The FV BETTY sank within five minutes thereafter (R. 2). At the time of the collision FV BETTY was drifting and, under the International Rules of the Road (33 U.S.C. § 1061, et seq.), underway without proper lights and without any member of the crew on watch (R. 2).

Subsequent to the collision, appellees, as owners of the FV EAGLE, were notified of separate claims being asserted against them on behalf of appellant Clatsop Fisheries, Inc., owner of the FV BETTY and of her captain, appellant Anderson (R. 3). Later, notice of two additional claims was received from the crew members of the BETTY by letter from their attorney alleging loss of gear, clothing, wages, and other injury (R. 2; Vol. II, R. 7-8).

Following receipt of the aforesaid claims, appellees caused the EAGLE to be appraised by independent surveyors, who set her value at \$32,000 (R. 7), timely filed their petition for limitation of liability pursuant to 46 U.S.C. §§ 183-189, and submitted their ad interim stipulation for value in a sum of \$35,000 (R. 3).

In due course, respondents-appellants Arthur Anderson and Clatsop Fisheries, Inc. filed their claims and answers alleging a total loss of \$90,000 which was, of course, substantially in excess of the appraised value of the FV EAGLE (R. 18). The answer denied that petitioners were entitled to exoneration from or limitation of liability and alleged that petitioner's vessel was unseaworthy, her master and crew negligent, all with petitioner's privity and knowledge (R. 18). In addition, said appellants specifically excepted to the value placed on the FV EAGLE and to the ad interim stipulation for value (R. 17).

## **SUMMARY OF ARGUMENT**

The instant case involves a maritime catastrophe with a multiplicity of claims which clearly exceed the liability of the owner under the Limitation Act. The case is one which is traditionally and peculiarly maritime in nature, all issues are contested by appellants, and the District Court properly exercised its discretion in declining to dissolve the statutory injunction (46 U.S.C. § 185) enjoining against prosecution of claims in other forums.

## **ARGUMENT**

### **I**

#### **The Instant Case Involves Multiple Claims which Greatly Exceed the Value of the Limitation Fund.**

At the time of filing the petition, the owners and operator of the FV EAGLE had received individual claims from two crew members of the BETTY (R. 3) and had been notified of other claims on behalf of both the corporate owner and the captain of the FV BETTY (R. 3).

After the filing of the petition for limitation and, together with their claims, answers and exceptions, appellants Anderson and Clatsop Fisheries, Inc., applied for dissolution of the injunction against other suits or actions arising out of the collision. It was alleged that Clatsop Fisheries, Inc. wished to file a proceeding in the Oregon state courts against petitioners for the loss of the FV BETTY. As a device to circumvent the Limitation

Act, appellants contended that they had reduced the number of claims by "advancing" to the individual crew member respondents "the amount of their respective claims" for which appellant Clatsop Fisheries, Inc. was acting as "trustee" (R. 21). In addition, appellants alleged that if the injunction was dissolved, and an action was thereafter prosecuted to judgment against petitioners in the Oregon state court, appellants would not (1) "claim as res judicata the personal liability of petitioners established in the state court action" but would agree that the same might be the subject of a subsequent, independent redetermination by the United States District Court and (2) would not seek to enforce and collect any judgment obtained in the state court except "in and through these (limitation) proceedings" after decision upon the same (R. 21).

One of the salient purposes of the Limitation Act is to eliminate a multiplicity of litigation and provide recourse for the determination of liability arising out of marine casualties where asserted claims exceed the value of petitioner's vessel. See, *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 413-418 (1954); *Providence and N. Y. Steamship Co. v Hill Mfg. Co.*, 109 U.S. 578 (1883). In the instant case, it is apparent that there are at least four separate claims because appellants' Stipulation and Motion seeking to dissolve the injunction asserted an individual claim by Arthur Anderson for personal effects (R. 20), claims on behalf of the two individual crew members as "trustee" for them (R. 21), and a claim by Clatsop Fisheries, Inc. for loss of the FV BETTY. The total claims far exceed the proposed limitation fund (R. 19).



Insofar as the general principles involved, this case is almost on all fours with *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546 (5th Cir. 1960) which was relied upon by the District Court in its order of August 10, 1965 refusing to dissolve the injunction against collateral proceedings (R. 29, 30). In *Pershing* the court was clearly faced with the question of whether in a multiple claim and inadequate fund limitation situation, an admiralty court should modify its traditional injunction and permit some of the claimants to establish claims in a common law court. The court carefully analyzed all the leading decisions dealing with the Limitation Act, including those relied on by the respondents in the instant case, and concluded that the admiralty court should retain jurisdiction in the case of multiple claims which exceed the limitation fund and in which the right to limit is disputed.

Recently, the United States District Court for the District of Illinois had occasion to agree with and follow *Pershing*, noting that:

"\* \* \* Upon a timely petition filed under Section 185, a shipowner has an absolute right to have the issues tried in the limitation proceeding whenever it appears that the value of his interest in the subject vessel is less than the aggregate of all claims pending against him based upon an alleged fault of the vessel." *Petition of Indiana Farm Bureau*, 235 F. Supp. 800, 801 (1964).

A Virginia district court in the recent case of the *San Jacinto*, 238 F. Supp. 928, 931 (E.D. Va. 1965) points out that the time element involved in connection

with the filing of a limitation proceeding, together with the fact situation, insofar as multiple claims, must also be given consideration by the district court in determining whether to dissolve the injunction against collateral proceedings.

“Claimants rely upon the leading case of *Langnes vs. Green*, 282 US 531, 1931 AMC 511,, as authority for opening the monition to permit further proceedings in the civil actions. The distinguishing feature in *Langnes* is that a single claim was there involved and the Supreme Court expressed ‘doubt upon the good faith of petitioner’ in alleging fear that other claims might be filed. Moreover, and of even greater importance, is the fact that the civil action was filed in the state court prior to the filing of the petition for limitation of liability—in fact, the petition was filed only two days prior to the scheduled state court trial of the civil action. Jurisdiction of the state court had already attached in *Langnes*, and the advantage of the limitation proceedings could have been obtained by a proper pleading in the state court as there was only one possible claimant and one owner. It was for these reasons alone that the Supreme Court ruled that the injunction against the state action should be dissolved, with a retention of jurisdiction as to the petition for limitation of liability in the event the state court should elect not to consider the limitation aspect of the case.

“The foregoing is in sharp contrast to the multiple claim-inadequate fund situation which is herein presented.”

By contrast, there are at least four separate claims which have been asserted in the instant case and the pe-

tition to limit liability was filed in good faith more than six months after the casualty. No civil action was pending in any court when the petition was filed and only one claimant has requested permission to file such action.

An analysis of the instant case supports retention of admiralty jurisdiction as (1) multiple claims are involved (2) there is an inadequate fund (3) no previous civil action was pending.

## II

### **Appellants' Effort to Reduce the Number of Claims was Ineffectual.**

During oral argument on the motion, appellants' proctor offered to abandon the individual claims of Captain Anderson and the two crew member respondents if the court felt it "necessary" as an additional prerequisite to dissolving the injunction (R. Vol. II, 4). It should be noted, however, that in the continuing posture of the case, said claims were never abandoned.

Secondly, it is doubtful whether appellants as an alleged "trustee" could properly prosecute or abandon the claims of Linville and Winters.

The initial claims asserted by the crew members (R. 3) were broad enough to include claims for personal injury. If such claims exist they may not be assigned or transferred to another for prosecution. *Rorvik v. North Pacific Lumber Co.*, 99 Or. 58, 190 P. 331, 195 P. 163 (1921); *Anno: Assignability of Claim for Personal Injury or Death*, 40 A.L.R.2d 500. Though the crew mem-

bers have released the FV BETTY from all claims, including personal injury claims, there is no consideration set forth therein which will support release of the FV EAGLE or her owners. *United Fruit Co. v. United States*, 186 F.2d 890 (4th Cir., 1951); see generally, Release, 76 C.J.S. § 10.

### III

#### **Appellants are Not Entitled to Proceed in State Court Where Limitation Contested.**

The motion to dissolve the restraining order was properly denied on another important ground. Appellants, by their answer, strongly contested all issues in the limitation proceedings, including valuation, sufficiency of the stipulation, seaworthiness of petitioners' vessel and the lack of privity (R. 17-18).

In *Ex Parte Green*, 286 U.S. 437 (1932), a sequel to *Langnes v. Green* cited by appellants, the United States Supreme Court held that a claimant wishing to proceed with an action against the shipowner in a state court must, *inter alia*, concede the issues raised by the limitation proceeding which are within the sole jurisdiction of the admiralty courts. In that case, the District Court for the Western District of Washington had held that:

"To pursue common-law remedy in the state court, the suitor must admit the right to limit liability, thus withdrawing from the case any federal question, and his recovery, if any, will be limited to the value of the schooner; and, if issue is taken upon the right to limit, then this court has jurisdic-

tion of the entire controversy." *The Aloha. In re Langnes*, 56 F.2d 647, 648 (1932).

On direct appeal, the Supreme Court affirmed and amplified its former opinion in the matter:

"It is clear from our opinion that the state court has no jurisdiction to determine the question of the owner's right to a limited liability, and that if the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case." 286 U.S. 437, 439 (1932).

This court has followed the two *Langnes'* opinions and indicated that a claimant who might otherwise be entitled to proceed in state court will not be permitted to do so where he has contested the right to limit liability. In *Red Bluff Bay Fisheries, Inc. v. Jurjev*, 109 F.2d 884, 885 (1940), Judge Healy set forth some of the conditions precedent to dissolving the injunction against collateral proceedings. He noted that only one claimant had appeared in response to the monition and it was not contended there might be others. Also, the right to limit liability was conceded by claimant and under such circumstances a common law proceeding was permissible. In this case, however, not only are there multiple claimants and an inadequate fund, but appellants have contested the right to limit liability and appellant Clatsop Fisheries, Inc. was therefore properly precluded from filing its proposed action in the Oregon state courts.



## IV

**Appellants Not Entitled to Proceed in State Court  
Where Value of the Limitation Fund  
is Contested.**

The appellants have excepted to the stipulation for value filed by petitioners and by their answer have contested valuation of the EAGLE as alleged in the petition to limit liability (R. 17).

Even under the broader rule adopted by the Court of Appeals for the Second Circuit permitting state court proceedings by a single claimant who agrees only that the admiralty court may try the *issue* of limited liability, such claimants have been required to concede the adequacy of the stipulation for value filed by petitioners in the limitation proceeding. *Petition of Red Star Barge Line*, 160 F.2d 436, 437 (1947) ("\* \* \* conditioned the order upon her concession of the correctness of the limitation fund.") *Petition of Moran Transportation Corp.*, 185 F.2d 386, 387 (1950) ("\* \* \* that she concede in writing the adequacy and amount of the stipulation for value.") See also Gilmore and Black, *The Law of Admiralty*, 695 (1957).

It is submitted that, in any event, the district court properly declined to dissolve the injunction where appellants had excepted to the stipulation for value.

**The District Court Exercised Its Sound Discretion in  
Retaining Admiralty Jurisdiction.**

The determination to retain the entire case within the admiralty jurisdiction was one within the court's sound discretion.

That appellants have shown no pressing reason why they should proceed in the state court is amply pointed out in the transcript of the argument (Vol. II, R. 11-12).

"THE COURT: Mr. Fredrickson, what is the disadvantage to your client in going forward in the usual and customary manner in the limitation proceeding?

MR. FREDRICKSON: Pardon me?

THE COURT: What is the disadvantage to your client?

MR. FREDRICKSON: In having the case tried here rather than in the state court?

THE COURT: Yes.

MR. FREDRICKSON: No. 1, we think he is entitled to have the case tried in state court.

THE COURT: I can't go along with you that he is entitled to. You certainly have to make some kind of a showing, under the facts of this case, to bring him within any right of any kind to have it tried in the state court."

The appellants have not made such a showing. Their claims exceed the limitation fund and there is still a multiplicity of claims with one claim for the value of the vessel by Clatsop Fisheries (R. 18, 20), a separate

claim by Arthur Anderson for personal effects (R. 20), and a further claim by respondents for the crew members (R. 21).

### CONCLUSION

The appellants have in effect denied all issues to be determined in the limitation proceeding, i.e. privity and knowledge, value, and damages, which will necessitate a full scale trial of all issues in that proceeding. At the time the limitation petition was filed there was no pending proceeding in any other court although more than six months had elapsed since the casualty. The conditions proposed by respondents are so complicated and varying from appearance to appearance that it is difficult to determine what issues would be tried in each proceeding. Under these circumstances to allow respondents to proceed in a state forum would result in two trials with no apparent benefits to either party.

It is submitted that the court's ruling was entirely within its sound discretion, in accord with existing authority, and that this appeal should be dismissed.

Respectfully submitted,

JERARD S. WEIGLER

ROCKNE GILL

Proctors for Appellees

**CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

**ROCKNE GILL**  
Attorney





No. 20,428

---

EB 10 1967

**United States**  
**COURT OF APPEALS**

**for the Ninth Circuit**

---

ARTHUR ANDERSON and CLATSOP  
FISHERIES, INC., an Oregon corporation,

*Appellants,*

v.

GENE R. NADON, DOROTHY IRENE  
NADON, and JATABORO CORPORATION,  
a corporation,

*Appellees.*

---

**REPLY BRIEF OF APPELLANTS**

---

*Appeal from the United States District Court  
for the District of Oregon*

---

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**FILED**

DEC 23 1965

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**United States**  
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ARTHUR ANDERSON and CLATSOP  
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**REPLY BRIEF OF APPELLANTS**

---

*Appeal from the United States District Court  
for the District of Oregon*

---

**REPLY BRIEF**

**The Claims and Their Value**

Petitioners assert that there are multiple claims having a value far in excess of the limitation fund (Appellees' Br. 3).

The record shows that the two-man crew of the F/V

BETTY received full payment of damages in the amount of \$773.27 (R. 25) and \$885.67 (R. 26) respectively from the owner of the F/V BETTY, Clatsop Fisheries, Inc. Each has executed a further acknowledgment of full payment and promises not to assert any claim against the F/V EAGLE or her owners (R. 23-24), and as a matter of fact neither has filed a claim and the time for filing claims expired on July 13, 1965 (R. 11). Surely, even appellees with all their fears of a multiplicity of claims, must concede that crewmembers Linville and Winters are neither actual nor potential claimants.

Petitioners urge that as Linville and Winters may have had claims for personal injuries, such claims were not assignable to Clatsop Fisheries as trustee and imply that therefore such claims are still held by Linville and Winters (Appellees' Br. 7-8). The question of whether or not the "trustee" can prosecute or abandon the claims<sup>1</sup> is irrelevant to the question of whether or not Linville and Winters are claimants. Linville and Winters, as noted, have been *fully* paid, disclaim any rights against petitioners and are now time-barred from making a claim.

The other claims are for loss of the F/V BETTY and the master's personal effects. The master, Arthur Anderson, is president of Clatsop Fisheries, owner of the F/V BETTY (R. 18). Mr. Anderson's claim is for approximately \$650 (R. 20). The total for individual losses is \$2,308.94. In order to save petitioners the burden of

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<sup>1</sup> The vesselowner is charged with the responsibility of asserting a claim to recover the lost lays or shares of the crew. *Van Camp Sea Food Company, Inc. v. DiLeva*, 171 F.2d 454 (C.A. 9, 1948); *U. S. v. Latlin*, 24 F.2d 683 (C.A. 9, 1928).



contesting the individual claims, Clatsop Fisheries has agreed that the claims be paid in full out of the limitation fund before payment to Clatsop Fisheries for loss of the F/V BETTY (R. 27-28). Petitioners' efforts to paint a picture of themselves as defending a multiplicity of litigation is fruitless; it is apparent that there will be but two suits in this case, one in the state court in Astoria for loss of the F/V BETTY, and one in the district court in these limitation proceedings.

In *San Jacinto*, 238 F. Supp. 928 (E.D. Va. 1965), relied on so heavily by the appellees (Br. 5-6), twenty-five Jones Act claimants filed claims totalling \$10,000,000 against a fund of \$900,000 (an 11-1 ratio). Whatever merits there are in the holding of the *San Jacinto*, none of the reasons are valid in this case. Furthermore, the court expressly reserved the question of whether the claimants could pursue their claims before a jury if limitation were denied.

### **Limitation and the Limitation Fund**

The appellees contend that by contesting limitation (Appellees' Br. 8) and the value of the fund (Appellees' Br. 10), appellants are foreclosed from proceeding in the state court.

Appellants have found no reason in support of the appellees' position. On the contrary, in forcing claimants to concede either or both limitation and value, the admiralty court would effectively deny access to the state court. Appellants will offer evidence that the BETTY and the EAGLE are each worth approximately \$65,000.

So long as the right to limitation (R.S. 4283) and the setting of the stipulation (R.S. 4285) are left with the district court, the owners of the **EAGLE** here obtained all that they have been promised by Congress.

On the question of the right to limitation, the Second Circuit has held that a waiver of "any claim of *res judicata* relevant to the issue of limited liability" is sufficient protection of the petitioner's rights. *Petition of Red Star Barge Line, Inc.*, 160 F.2d 436, 438 (C.A. 2, 1947) cert. den. 331 U.S. 850. Here appellants filed just such a waiver (R. 21). The court held that the only concession required is that the petitioner may litigate his right to limitation in the admiralty court.

In the case of *W. E. Hedger Transportation Corporation v. Gallotta*, 145 F.2d 870 (C.A. 2, 1944), the claimant was allowed to proceed in the state court after filing a consent to the petitioner's right to limit and that value be fixed in the limitation proceeding. The court held that after the filing of the consent the admiralty court retained jurisdiction only for fixing value.

In *The Lotta*, 150 Fed. 219 (E.D.S.C. 1907), subsequently cited with approval in *Langness v. Green*, 282 U.S. 531, the district court held that the value of the petitioner's vessel could be decided in the state court proceeding. This court has approved an order that the value of the petitioner's vessel should be determined in the state court. *Red Bluff Bay Fisheries, Inc. v. Jurjev*, 109 F.2d 884 (C.A. 9, 1940). It seems inescapable to conclude that if the value of the petitioner's vessel were to

be determined in the state court case, the stipulation for value could not be set until then.<sup>2</sup>

It thus appears that the claimant is entitled to litigate both the issue of value and limitation in the admiralty court and also have his state court trial to determine his damages.

### **The District Court's Discretion**

The district court and appellees (Br. 11) seem to contend that appellants have to formulate some special reason or circumstance entitling Clatsop Fisheries to proceed in the state court. No case authority is cited for such a proposition and appellees have advanced no reason for such a rule. The "saving to suitors" clause does not require reasons for wanting a jury trial in a state court.

It is interesting to note that the district court never pointed out why Clatsop Fisheries should not be permitted to proceed in the state court or what kind of showing is needed. Appellants offered to take all necessary steps entitling Clatsop Fisheries to a state court trial (Vol. II, R. 4). As a consequence, appellants were never advised whether the priority consent was inadequate or whether it would be necessary to give up the claims to recover for Mr. Anderson's losses and payments to Linville and Winters.

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<sup>2</sup> In *The Lotta*, *supra*, at pp. 222-223, the district court noted that the stipulation was set on the basis of *ex parte* appraisals by persons chosen by the petitioner and that the claimant ought to have the opportunity to be heard. The same situation prevails here.

## CONCLUSION

Appellants have agreed to all that is reasonably necessary to protect appellees' limitation rights and, therefore, the order of the district court denying appellant Clatsop Fisheries, Inc. access to the state court should be overruled.

Respectfully submitted,

GRAY, FREDRICKSON & HEATH  
FLOYD A. FREDRICKSON  
Attorneys for Appellants

## CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

FLOYD A. FREDRICKSON  
Attorney

NOV 10 1967  
No. 20,428

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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

ARTHUR ANDERSON and CLATSOP  
FISHERIES, INC., an Oregon corporation,

*Appellants,*

v.

GENE R. NADON, DOROTHY IRENE  
NADON, and JATABORO CORPORATION,  
a corporation,

*Appellees.*

---

**PETITION FOR REHEARING**

---

*Appeal from the United States District Court  
for the District of Oregon*

---

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In accordance with the provisions of Rule 23(5) of the Rules of this Court, appellees request the case be reheard en banc because of the importance of the question presented by this petition insofar as it affects correct judicial procedure.

**The Question Presented on Appeal Was Whether or Not  
The Court Below, Acting on The Record Before It,  
Did or Did Not Abuse Its Discretion**

In this maritime limitation of liability proceeding, appellants had attempted to convert what was concededly a multiple claim-inadequate fund case into a single claim-inadequate fund case, so as to permit dissolution of the District Court's injunction against other proceedings and commence a state court action against appellees. In so doing, appellants filed documents variously designated as "disclaimers," "releases," and a "priority consent." In addition they relied upon a theory of "trusteeship" for crewmen's claims, attempted to waive the res judicata effect of any state court judgment in certain respects, and offered to (but did not) abandon the three individual claims previously asserted.

Upon submission for decision and careful consideration of the record, the trial judge declined to dissolve the injunction (R. 29). In so doing it exercised the sound discretion which should be "invoked as a guide to judicial action" in cases of this kind. *Langnes v. Green*, 1931, 282 U.S. 531, 541, 51 S. Ct. 243, 75 L. Ed. 520.

On this appeal, the scope of appellate review is limited to determining whether or not there was abuse of discretion or an improvident exercise thereof by the

court below. *Delno v. Market Street Ry. Co.*, 9th Cir., 1942, 124 F.2d 965; *Bowles v. Huff*, 9th Cir. 1944, 146 F.2d 428, 431; *Cf.*, *Ex Parte Green*, 1932, 286 U.S. 437, 52 S. Ct. 602, 76 L. Ed. 1212.

### **District Court's Decision Correct on the Record Presented**

This Court's opinion concedes that appellants had not effectively converted this matter into a single claim case when their motion was submitted for decision by the District Court (Op. 8). Clearly that decision was correct on the facts presented but this Court has now permitted appellants to reopen the matter and make a further attempt to achieve their purpose.

Due to the infinite variety of fact situations which may arise in a maritime catastrophe, the decision as to whether an appropriate case has been presented for dissolution of the statutory injunction in any given instance is peculiarly one for the District Court which is in the best position to review the facts and control the proceedings. Each case presents a different set of circumstances and claims. See, e.g. *Petition of Republic of South Korea*, D.C. Or. 1959, 175 F. Supp. 732.

In this case, on the record before it, the District Court properly declined to dissolve its injunction and hence the sole question on appeal was whether such decision constituted an abuse of discretion. *Langnes v. Green*, supra; *New Albany Waterworks v. Louisville Banking Co.*, 7th Cir. 1903, 122 Fed. 776, 782. It has not been suggested in any way that the District Court abused or improvidently exercised its discretion; nor is such the case.

**Remand With Instructions as to The Manner in Which  
Court Below Should Exercise Its Discretion on a  
Hypothetical State of Facts Is Wholly Beyond  
the Power of This Court**

In its opinion of March 30, 1966 this Court held:

“\* \* \* that if, on the remand of this cause, Clatsop abandons on the record any claims asserted as trustee or assignee of Linville and Winters, and Anderson abandons on the record his personal claim, an exercise of sound discretion will require the district court to dissolve the injunction sufficient to enable Clatsop to proceed with an action in the courts of Oregon on its claim for the loss of the BETTY.” (Op. 8-9)

Such a holding goes beyond the scope of judicial review and seeks to circumscribe the District Court's function in exercising its discretion upon the remand of this case for further proceedings. Heretofore, it has been the rule that such directions will issue from this Court only in the form of a writ of mandamus to be granted when the lower court has acted in excess or abuse of its discretion. *United States v. Hester*, 9th Cir., 1963, 325 F.2d 654; *Frost v. Yankwich*, 9th Cir., 1958, 254 F.2d 633.

In the case at bar appellees had, as noted, sought by various devices to reduce the previously asserted claims to a single claim. Judge Kilkenney evidently concluded that they had not effectively done so and

“\* \* \* having considered the offers of said petitioners (Anderson, et al), and being of the belief that an allowance of said motion would not conform to the statutory scheme as created by Congress in connection with the exoneration from, or

limitation of liability, in admiralty cases as interpreted, and in my opinion, properly construed in *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546 (5th Cir. 1960), and the Court being now fully advised, \* \* \*” (R. 29)

denied appellants’ motion to dissolve the injunction.

This court’s opinion, however, allows appellants to make further efforts to reduce the number of claims and purports to control exercise of the District Court’s discretion if and when suggested future steps are taken by appellees herein. Such an order is wholly beyond the power of this Court and appellees respectfully suggest that the same should be withdrawn.

Should this Court determine that appellants are entitled to take further steps in their effort to reduce the number of claims, the case should be remanded for that purpose without limitation upon the District Court’s power to redetermine the matter on the basis of the supplemental record, the facts and the law. *Kontos v. The SS SOPHIE C*, 3rd Cir. 1961, 288 F.2d 437.

Respectfully submitted,

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 KINSEY & WILLIAMSON  
 KENNETH E. ROBERTS  
 Proctors for Appellees.

**CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules, and I further certify that in my judgment the foregoing Petition for Rehearing is well founded and not interposed for delay.

JERARD S. WEIGLER  
Of Attorneys for Appellees



FEB 14 1967

No. 20,429 ✓

IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

---

HUDSON WATERWAYS CORPORATION,	} <i>Appellant,</i>
VS.	
WILLIAM J. SCHNEIDER,	} <i>Appellee.</i>

---

**APPELLANT'S OPENING BRIEF**

---

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**FILED**

**JAN 17 1966**

WILLIAM F. WILSON, Clerk



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No. 20,429

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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HUDSON WATERWAYS CORPORATION,	}
<i>Appellant,</i>	
vs.	
WILLIAM J. SCHNEIDER,	}
<i>Appellee.</i>	

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**APPELLANT'S OPENING BRIEF**

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**JURISDICTION**

Jurisdiction of this Court exists by virtue of 28 U.S.C. §1291 and a Notice of Appeal filed on July 9, 1965 (R. 82)<sup>1</sup> from a Final Decree (R. 79) in Admiralty entered in the United States District Court for the Northern District of California on May 14, 1965.

The District Court had jurisdiction, under 28 U.S.C. §1333, by virtue of a seaman's libel (R. 1) for damages under the Jones Act (46 U.S.C. §688) and the General Maritime Law.

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<sup>1</sup>Since the Record on Appeal is composed of a volume of the Clerk's Record (Volume I) and four volumes of Reporter's Transcript (Volumes II-V) with separate pagination not continuous with the Clerk's Record, we have designated the references with "R." for the Clerk's Record, and "Tr." for the Reporter's Transcript.

### STATEMENT OF THE CASE

William J. Schneider, a seaman and licensed marine engineer, commenced this action by filing a Libel (R. 1) against his former employer, Hudson Waterways Corporation, for damages, claiming to have been injured by an electrical shock while attempting to repair an electric air compressor in the line of his duties as an engineering officer aboard the SS TRANSORLEANS. After trial a decree was entered in favor of Schneider in the amount of \$40,427, with interest and costs (R. 79-80) from which the Respondent has appealed (R. 82).

In the following account of the incident, except where otherwise indicated, we rely upon the evidence given by Schneider himself.

Schneider was employed as Third Assistant Engineer aboard the SS TRANSORLEANS from January 15, 1964 until February 14, 1964 (Finding 4, R. 68; Tr. 8) and was the watch officer on the 8:00 to 12:00 watch (Finding 5, R. 68; Tr. 12). About noon on January 27, 1964 Schneider was told by the First Assistant Engineer to find out what was wrong with the stand-by air compressor, which had stopped running, and get it going again (Finding 5, R. 68; Tr. 12-13). Schneider was qualified to undertake the repair of an air compressor unit of this type (Tr. 80). The air compressor was generally familiar to him (Tr. 80, 88) and the particular portion of the unit from which he received a shock was described by him as "standard equipment" (Tr. 88).

The first thing he did when he got to the unit was to note that somebody had pulled the circuit breaker and his first act was to put power to the unit by closing the cir-



cuit breaker (Tr. 15, 98). The next thing he did was to try to start the unit by manipulating the manual starting switch or "trigger" (Tr. 15, 99), which protruded from an enclosed box (Tr. 16) referred to as a pressure regulator (Tr. 96, 97), located at the base of the unit (Tr. 88). As he reached for this switch he noticed that the regulator box had in some manner been loosened from the frame and was tilted on its base so that it hung by its electrical wires and he attempted to steady it with his left hand while he turned on the switch with his right hand (Finding 5, R. 69; Tr. 16, 280, 281). As he did so he received an electric shock (Finding 5, R. 69; Tr. 16). When Schneider proceeded with the repair of the unit he opened the regulator box and found some bare wires touching the inside of the box, as a result of the box's being tilted off its mounting. This condition was evidently responsible for the breakdown of the compressor as well as the electrical shock and when Schneider repaired it the compressor was restored to operation (Finding 8, R. 70; Tr. 18-20).

As a part of Schneider's routine duties, he had made several inspection tours to check engine room equipment during each watch (Tr. 278). Each tour would normally include the air compressor unit and he made at least one such tour during his 8:00 to 12:00 watch on January 27, 1965 (Tr. 279). He found nothing wrong with the air compressor unit (and particularly the pressure regulator) at any time during the voyage, either operationally or through observation (Tr. 12, 279, 281) prior to being told by the First Assistant Engineer that something was wrong.

The record contains no evidence at all as to the following:

- (1) How the condition of the box came about or that it existed for any length of time prior to its being called to Schneider's attention;
- (2) Any inspections of the equipment by anyone other than Schneider which might have disclosed the condition, or
- (3) Violation of any practice or other standard of care regarding maintenance or inspection which would have disclosed the condition to others at an earlier time.

Upon this record the District Court held the vessel unseaworthy, extending the warranty of seaworthiness to the very equipment and condition which a skilled seaman is assigned to repair for the explicit reason that it is not working, and went on to hold Respondent negligent, upon the ground that it maintained the regulator box unsecured to the air compressor unit and that this defective condition of the box which, combined with the wiring inside, produced the shock, was known or should have been known to Respondent in the exercise of ordinary care (Finding 8, R. 70). At the same time the Court absolved the Libelant, the only qualified person shown to have conducted inspections of the compressor, of any contributory negligence (Finding 10, R. 70).

### QUESTIONS PRESENTED

1. Should the warranty of seaworthiness be extended to embrace equipment which is known and represented to be unfit on account of damage and to a condition which the injured officer, qualified to do so, was directed to find and repair?

2. Is the shipowner liable on the ground of negligence with respect to the condition of equipment where there is no showing as to how the condition came about and no showing that the owner had or should have had knowledge of the condition through anyone other than the very officer claiming injury?

3. Is an officer free of negligence where the Court finds that the injury of which he complains arose from negligent failure to discover and correct a condition and the evidence fails to show that anyone other than he inspected the equipment or had the duty to do so?

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### SPECIFICATION OF ERRORS

The following errors are relied upon by Appellant:

1. The District Court erred in holding that the vessel's warranty of seaworthiness extended to the Libelant, with respect to the conditions found defective in this case to which the Libelant was exposed by reason of his having to find and repair such conditions, and the Court therefore erred in finding the vessel unseaworthy as to the Libelant.

2. The District Court erred in finding and holding Respondent liable to Libelant on the ground of negligence

in the absence of evidence of negligence on the part of anyone other than Libelant himself and, specifically, in the absence of evidence of any requirement of maintenance or inspection, apart from the inspections conducted by the Libelant himself, which might have led to the discovery of the defective condition.

3. The District Court erred in finding and holding the Libelant free of contributory negligence, in view of the Court's having found that the condition complained of arose from negligence and of the Court's having so found upon evidence not sufficient to show negligence of anyone but the Libelant.

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### **SUMMARY OF ARGUMENT**

I. Appellee in this case was injured in the course of finding and repairing the cause of a breakdown and as a result of precisely the condition which he was, in accordance with his duties as an engineering officer, engaged in finding and repairing. As he was engaged to do this work and was told, and had himself ascertained, that the equipment involved was unseaworthy, rather than seaworthy, the extension of the warranty of seaworthiness to him in this matter is a contradiction in terms which is wrong in principle, as contrary to the nature of a warranty and to the criterion of reasonableness which governs the warranty of seaworthiness, and is in conflict with the judicial precedents which have all recognized this principle.

II. The finding of negligence in this case is based upon an alleged duty of inspection, discovery and maintenance. Appellee had the burden of proving the standard of care

to be applied and its violation but there was no evidence presented showing any standard of inspection, discovery and care which had been violated and the only evidence with respect to such matters was the affirmative evidence of Appellee that he himself, in the line of his duties, made inspections of the equipment as late as the forenoon of the day in which he was injured and found nothing wrong. In this state of the evidence, the only person whose activities could support the finding of negligence was Appellee himself, and the finding of negligence must be based upon his own improper performance of duty. But liability under the doctrine of *respondeat superior* does not extend to liability for the negligence of the injured man himself, and it was therefore wrong to hold the vessel liable on this basis.

III. As the record was such that the finding of negligence must be based upon the performance of Appellee himself, it was manifestly erroneous to find that he had not been contributorily negligent and, as his negligence involved the failure to perform a supervisory duty to his employer, rather than merely inattention to his own safety, it is the kind of negligence which, under established doctrine, does not merely reduce damages but bars recovery completely.

in the absence of evidence of negligence on the part of anyone other than Libelant himself and, specifically, in the absence of evidence of any requirement of maintenance or inspection, apart from the inspections conducted by the Libelant himself, which might have led to the discovery of the defective condition.

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## ARGUMENT

## I

**THE WARRANTY OF SEAWORTHINESS IS NOT AN UNDERTAKING THAT A REPAIR JOB WHICH AN ENGINEER IS ENGAGED TO DO WILL NOT NEED TO BE DONE**

The findings, amplified by Schneider's testimony, show that he inspected and, when necessary, repaired the compressor and that as part of his duties he received a shock as a result of the very condition which had caused the compressor to stop running and which he had been sent, in his duty as an engineering officer, to find and repair (Findings 5, 6 and 8, R. 69-70; Tr. 18-20, 278-279). Because of the existence of the damage which Schneider was sent to repair, the District Court has held the vessel unseaworthy, despite the fact that the equipment in question was not represented or held out as being fit but, on the contrary, was represented and known to all concerned to be unfit, and despite the fact that it was a portion of the equipment which the Appellee, as a skilled engineer, was hired to keep fit and to repair when it should be unfit.

The District Court has thus held that the warranty of seaworthiness amounts to an undertaking that a repair job which an engineer is engaged and paid to do will not need doing. In so holding, the Court has run counter to the principles involved in the warranty of seaworthiness. Both reason and authority are overwhelmingly to the contrary.

Appellant does not deny its duty to furnish a vessel and appurtenances reasonably fit for their intended service, as set forth in *Mitchell v. Trawler Racer*, 362 U.S. 539, 1960 A.M.C. 1503, but "[t]he mere fact that a seaman has been ordered to do a dangerous thing does not estab-

lish a case of unseaworthiness.” *Bruszewski v. Isthmian Steamship Co.*, 163 F. 2d 720, 722, 1947 A.M.C. 899, 901 (3d Cir.). Appellant does not dispute the proposition that a defective compressor regulator may amount to an unseaworthy condition in certain circumstances. What Appellant does challenge is the applicability of the warranty of seaworthiness under the circumstances presented by this case, for the warranty of seaworthiness is not a warranty that the ship or gear is absolutely fit in all events, but only reasonably so, depending upon the circumstances. The key to the applicability of the warranty of seaworthiness is reasonableness.

It is quite obviously not reasonable to construe the warranty of seaworthiness to apply to that which is expressly represented as unfit for service and requiring attention. To do so is a contradiction of the very term “warranty”, which characterizes the obligation. This principle has been clearly recognized and applied by the Supreme Court, in *West v. United States*, 361 U.S. 118, 121-122, 1960 A.M.C. 15, 17-18 (1959). There the vessel was in the shipyard for overhaul and a workman was injured, not as in the present case by the very condition which he was to repair, but as a result of another faulty condition in the vicinity. The Supreme Court pointed out that the purpose of the vessel’s being in the yard was to make her seaworthy, that the condition which had caused the injury was included in the specifications for repair, that the representations of the repair contract specifications showed that she was not seaworthy and, therefore, that “[i]t would be an unfair contradiction to say that the owner held the vessel out as seaworthy . . .” Thus the

Supreme Court plainly recognized the element of representation, or holding out, in the warranty of seaworthiness and acknowledged that the warranty did not apply where the unfitness was known and the condition was held out not as one of fitness but as one of unfitness and needing repair.

Logically considered, "[l]iability for an unseaworthy vessel should obtain only where the individual affected is entitled to rely, and does rely, upon the seaworthiness of something actually unseaworthy." *Bruszewski v. Isthmian Steamship Co.*, 163 F. 2d 720, 722, 1947 A.M.C. 899, 901 (3d Cir.). In the *Bruszewski* case certain longshoremen were called upon to assist the crew in removing a broken boom from the vessel. In the process a loose block suspended in the rigging dropped upon one of the longshoremen, injuring him. The longshoreman claimed damages on the grounds of negligence and unseaworthiness. The Court considered that the broken boom presented an obvious danger to those engaged in removing it and refused, as a matter of law, to apply the warranty of unseaworthiness in this situation, saying: "To state that a broken boom is warranted as seaworthy would require distortion of the meaning generally awarded those terms."

In *Byars v. Moore-McCormack Lines, Inc.*, 155 F. 2d 587, 1946 A.M.C. 985 (2d Cir.), the plaintiff fell through a defective hatch which he had been sent to assist in repairing. The Court of Appeals rejected his claim, stressing the plaintiff's knowledge of the defect and that the very fact of its existence was the reason for his presence and stating:

“An employee cannot recover for injuries received while doing an act to eliminate the cause of the injury. . . . ‘The reason for this exception to the general rule is that it would be manifestly absurd to hold a master to the duty of providing a safe place when the very work in which the servant is engaged makes it unsafe.’ ”<sup>2</sup>

In *McDaniel v. The Lisholt*, 257 F. 2d 538, 540, 1958 A.M.C. 1832, 1835 (2d Cir.), a fireman who boarded the vessel to put out a fire claimed the benefit of the warranty of seaworthiness and the Court quoted from *Byars v. Moore-McCormack Lines, Inc.*, *supra*, and rejected his claim, stating:

“[I]t is undisputed that the vessel was unseaworthy at the time libellant went aboard. He was stationed aboard the ship because of the vessel’s unseaworthiness occasioned by the fire. There can be no duty to furnish a seaworthy ship to a fireman who was on the vessel knowing it to be unseaworthy, and was on board because of its unseaworthiness.”

Accordingly, in *Pinto v. States Marine Corporation of Delaware*, 296 F. 2d 1, 1962 A.M.C. 104 (2d Cir.), where the plaintiff was injured as a result of the necessity of carrying a broken signal light somewhat awkwardly from the bridge to a workshop below to be repaired, while the issue of unseaworthiness was keenly contested on other grounds and the judgment for the shipowner was upheld, it was never suggested by very able counsel or an experienced Court that the broken light (which would constitute

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<sup>2</sup>Quoted from *Kowalsky v. Conreco Company*, 264 N.Y. 125, 190 N.E. 206 (1934).

unseaworthiness in other circumstances) could be made a basis for recovery.

In *Lieberman v. Matson Navigation Co.*, 300 F. 2d 661, 1962 A.M.C. 1281 (9th Cir.), a seaman sought damages for a fall on the deck, which he claimed was unseaworthy because it was covered with a soapy detergent which he had assisted in applying for the purpose of removing wax. The District Court refused to find unseaworthiness and this Court affirmed, stressing in its opinion the seaman's participation in, and therefore knowledge of, the condition of which he complained.

In *Maiden v. United States*, 253 F. 2d 953, 1958 A.M.C. 1362 (9th Cir.), the libellant had been injured when he was struck by a heavy wave which came over the bow of the ship while he was carrying out an inspection of concrete plugs in the hawse pipes, which had suffered breakage in heavy weather. Obviously, such breakage would have rendered the vessel unseaworthy as to seamen in other circumstances, but the District Court declined to hold the vessel liable for unseaworthiness in these circumstances and this Court affirmed.

In *Pinion v. Mississippi Shipping Co.*, 156 F. Supp. 652, 656, 1957 A.M.C. 2308, 2312 (E.D.La.), as here, the libellant claimed to recover for the defective condition of the very thing which he was engaged in repairing, and the Court said:

“Here libellant, a ship repair man, was aboard the vessel to replace pipe which was wasting away under the corrosive influence of salt water. He knew the pipe had outlived its usefulness, hence its replacement. Under these circumstances, the shipowner did



not warrant the seaworthiness of the pipe or of the vessel in respect to the pipe. *Bruszewski v. Isthmian S.S. Co.*, *supra*; *Byars v. Moore-McCormack Lines*, *supra*. Quite the converse. By paying Pinion's employer to replace it, the shipowner in effect warranted that the pipe was unseaworthy, that it should not be relied on, that it was dangerous. Under the circumstances, it would be absurd to hold that the vessel herself was unseaworthy and that her owner is liable in damages because of defective pipe which libellant was brought aboard to replace."

To the same effect, although without discussion, is *Raidy v. United States*, 153 F. Supp. 777, 781, 1957 A.M.C. 1852, 1858 (D.Md.) *aff'd* on opinion of D.C., 252 F. 2d 117, 1958 A.M.C. 1328 (4th Cir.), where the Court said,

"It seems to me a misnomer to speak of the removable and absent footplate as 'unseaworthiness of the ship.' The removal of the absent plate, for the substitution of others, was a part of the work required to be performed by the contract specifications."

The different verbal approaches of the courts in applying the doctrine of unseaworthiness in these cases is unimportant. The basic proposition underlying them all is perfectly valid. It is that where a person otherwise entitled to the warranty of unseaworthiness is aware that an appurtenance is broken or malfunctioning and is sent to repair or correct it, the shipowner cannot be said to warrant that particular item as reasonably fit for its intended use and the person cannot be said to rely on such a warranty when he knows that the item is not fit.



Once the shipowner and the seaman are both aware that an appurtenance is not functioning properly, it is a *non-sequitur* to claim that the warranty of seaworthiness still applies. At this point, the shipowner has knowledge of the improper condition and should take steps to correct it. Its action or inaction must thereafter be gauged by customary negligence standards. To place the shipowner at the peril of being absolutely liable for any injury incurred by a seaman while fixing an obviously faulty condition would be "absurd," as the Court said in *Pinion*,—"an unfair contradiction," as the Supreme Court said in *West*.

Often repairs must be accomplished at sea while working under difficult and perhaps dangerous conditions. To apply a standard of absolute liability in such a situation tends to discourage prompt repair at a time when it might be imperative that this work be accomplished in order to avoid exposing the crew and the ship to further hazards. Depending upon the circumstance, the shipowner may be obligated to take greater than ordinary precautions in assigning the work, clearing the area and providing necessary assistance and tools, but the shipowner cannot, as either a logical or a practical matter, be said to warrant the fitness of equipment that is plainly asserted to be malfunctioning.

## II

**THE SHIPOWNER IS NOT LIABLE FOR NEGLIGENCE WHICH  
IS NOT SHOWN TO BE THAT OF ANYONE BUT THE  
LIBELANT**

Under the Jones Act, the plaintiff must bear the burden of going forward with evidence on all the essential elements of a negligence action. He must prove the existence of a duty, the negligent violation of that duty by the defendant and a causal relationship of the violation to the injury sustained. *Lind v. American Trading & Production Corp.*, 294 F. 2d 342, 347, 1961 A.M.C. 2467, 2475 (9th Cir.).

In determining that Appellant was negligent, the District Court did not mention in its Memorandum Opinion (R. 66) the nature of the duty owed by Appellant to Appellee. From Finding 8 (R. 70), however, it would appear that the duty involved was the proper maintenance of the ship's auxiliary air compressor unit (hereafter referred to as the "compressor").<sup>3</sup> Finding 8 indicates that this accident occurred as a result of negligent failure to discover and correct the condition of the pressure regulator portion of the compressor unit by proper maintenance. The duty to discover the condition involves inspection and a failure of adequate inspection is indicated by the language in Finding 8 to the effect that

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<sup>3</sup>Finding 8 also suggests that Appellant is liable for its failure to provide Appellee with a safe place to work, in that the equipment in question proved incapable of performing its function in the manner for which it was designed. Failure to provide a safe place to work does not afford an independent ground for the recovery of damages. Where a particular area is made unsafe, liability can only be predicated upon proof of the shipowner's failure to exercise reasonable care in that regard. *West v. United States*, 361 U.S. 118, 1960 A.M.C. 15 (1959).

the condition, "in the exercise of ordinary care should have been known to respondent."

There is no evidence whatever in the record to indicate that Appellant failed to maintain and inspect this compressor or any portion of it through any person other than Appellee Schneider. The record contains no comment regarding the procedure for the upkeep of the compressor and there is no indication that anything was wrong with it at any time during the voyage prior to the noon hour of January 27, 1964, the date of this accident. No evidence was introduced to the effect that proper inspections of the compressor were not undertaken or that, had they been undertaken, the cause of the malfunction would have been discovered. No evidence was introduced as to what inspections or maintenance procedures were "usual or customary or required by good practice or by law or regulation."<sup>4</sup>

The only testimony concerning the inspection and maintenance of the compressor came from Schneider himself. As a part of his routine duties he made inspection tours to check engine room equipment (Tr. 278). Each tour would normally include the compressor unit and he made at least one such tour during his watch on January 27, 1964 (Tr. 279). He found nothing wrong with the compressor unit, and particularly the pressure regulator (Tr. 281), that day or at any other time during the voyage (Tr. 12, 278, 279). The first indication Schneider had that the compressor was not functioning properly came at noon on January 27, 1964, when the first assistant

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<sup>4</sup>*The Belgrano*, 299 F. 2d 897, 904, 1962 A.M.C. 1327, 1336 (9th Cir.).

engineer informed him that the compressor had stopped running and asked him to find out what was wrong with it (Tr. 12, 13).

The timing of the discovery of this malfunction is significant in evaluating the District Court's finding of negligence. Schneider inspected the compressor during the 8:00 to 12:00 watch on January 27 and found nothing wrong with it (Tr. 279); yet between the time of his inspection and 12:00 noon, when he went off watch, the compressor stopped running (Tr. 12, 13). If the condition had arisen prior to his inspection this would indicate that Schneider's inspection was not adequate; otherwise, the cause of the malfunction would have been detected. If this is so, the shipowner's negligence in failing properly to inspect is only commensurate with Schneider's own negligence and the shipowner's liability, if any, would arise directly as a result of Schneider's substandard performance.

If the condition giving rise to the malfunction occurred between the time of Schneider's inspection and noon on January 27, 1964, Appellee can hardly be guilty of improper maintenance, given the short interval of time involved, particularly when the malfunction was not detected by the engineer (Schneider) on duty at the time.

Even in applying the doctrine of comparative negligence, libelant cannot recover from the shipowner where the only negligence proved was his own negligence. *Guarracino v. Luckenbach Steamship Co.*, 333 F. 2d 646, 1964 A.M.C. 2240 (2d Cir.); *The Benny Skou*, 346 F. 2d 993 (2d Cir. 1965).

The negligence issue in this case is like that in *The Belgrano*, 299 F. 2d 897, 1962 A.M.C. 1327 (9th Cir.) where this Court reversed the District Court's finding of negligence. *The Belgrano* involved a longshoreman's injury from a defect of ship's gear which was plainly visible on inspection, and was actually discovered by longshoremen the previous day. The District Court found that the shipowner had a duty to make a reasonable inspection of the ship's gear and equipment to see that it was operating properly, and that this duty had been breached. In reviewing the record, this Court found that the libelant established the following propositions: (1) that the accident occurred, (2) that it occurred because of a malfunction in ship's gear and (3) that the stevedores discovered the malfunction shortly before the accident. 299 F. 2d, at 904, 1962 A.M.C. at 1336. Precisely the same situation is presented by the record in this case, except for the immaterial difference that here the malfunction was discovered much closer to the time of the accident and by a member of the crew.

In *The Belgrano*, this Court stated that it could not be inferred from the record that reasonable inspection by the vessel would have revealed the cause of the malfunction:

“The vice of [the libelant's] argument is the absence from the record of any testimony establishing, or tending to establish, the standard of conduct which respondents were required to meet in discharge of their duty to make a reasonable inspection to see that the gear and equipment furnished by them operated properly. There is no testimony in the record of what conduct on the part of operators and owners of ves-

sels of the type or similar to the type of the BELGRANO and similarly equipped, was usual or customary or required by good practice or by law or regulation in making inspection of gear and equipment. Is the standard of conduct met by a visual inspection of the gear and equipment? Does the standard of conduct require an operational test of the gear and equipment of a vessel? Does the standard of conduct require constant inspection? Does the standard of conduct require daily inspection? Does the standard of conduct require inspection before and after each use of the gear and equipment? The record leaves us completely in the dark in attempting to find answers to these questions." 1962 A.M.C. at 1336; 299 F. 2d at 904.

These observations are equally applicable in this case, not only as to inspections, but also as to maintenance.

The mere fact that an accident occurred cannot support a finding of negligence. *West v. United States, supra*; *The Belgrano, supra*. The Jones Act does not make an employer responsible for acts which do not constitute a breach of duty to the seaman. *Hawley v. Alaska Steamship Co.*, 236 F. 2d 307, 311, 1956 A.M.C. 1877, 1883 (9th Cir.). And the seaman's own negligence is not such a breach of duty. *Guarracino v. Luckenbach Steamship Co., supra*; *The Benny Skou, supra*.

Thus, the record shows that the finding of negligence is based upon no evidence whatever of negligence on the part of anyone but Schneider himself, and the authorities show that the doctrine of *respondeat superior* has not been extended to the imposition of liability on that basis. For the reasons indicated above, the District Court's find-



ings with respect to Appellant's negligence cannot be supported on the record and must be set aside.

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### III

#### **THE DISTRICT COURT ERRED IN FAILING TO HOLD AGAINST APPELLEE ON THE ISSUE OF CONTRIBUTORY NEGLIGENCE**

The Court found negligence in this case (Finding 8, R. 70). From the foregoing discussion, it is apparent that Schneider was guilty of that negligence in failing to perform the expert and supervisory duties for which he was hired. In the face of this, it is clear the Court erred in finding Appellee "not guilty of contributory negligence" (Finding 10, R. 70).

The Court's negligence finding suggests that proper inspection would have resulted in a warning to Schneider which would, in turn, have resulted in his avoiding the shock. Yet the only evidence concerning inspection was that Schneider himself, in the course of his regular duties, conducted the inspections of the equipment. His failure to make an adequate inspection and discover the condition of the equipment was a breach of his regular duties to his employer, rather than mere inattentiveness to his own safety.

It is a long-established doctrine that negligence of the injured man in failing to carry out his responsibilities to his employer is a bar to recovery, as distinguished from mere attentiveness to his own safety, which is the only kind of contributory negligence contemplated under the provision of the Federal Employer's Liability Act (45



U.S.C. §53) providing that contributory negligence shall reduce the damages. *Great Northern Ry. Co. v. Wiles*, 240 U.S. 444, 448 (1916); *Davis v. Kennedy*, 266 U.S. 147, 149 (1924); *Bradley v. Northwestern Pacific R. Co.*, 44 F. 2d 683 (9th Cir. 1930).

As the Jones Act, 46 U.S.C. §688 operates by the incorporation of the Federal Employer's Liability Act, the same rule applies in seamen's cases, as held in *Walker v. Lykes Bros. Steamship Co.*, 193 F. 2d 772, 1952 A.M.C. 269 (2d Cir.). There the Court denied recovery to the master of the vessel for injuries resulting from a defective condition which he had known about for some time and which it was his duty to arrange to have repaired. The fact that the *Walker* case involved the master, rather than a lower ranking officer, is immaterial, since the essence of the case is the existence of responsibility for the task in the person claiming injury, and the F.E.L.A. cases upon which the doctrine rests abundantly show that it is not restricted to senior managerial employees.<sup>5</sup>

As it is clear that Schneider himself is involved in the negligence which the District Court found in this case and that his negligence was of the type involving a

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<sup>5</sup>The distinction between inattentiveness to one's own safety and failure to perform one's duty to his employer is that in the latter the employer has a separate cause of action against the officer involved. *States Steamship Co. v. Howard*, 180 F. Supp. 461, 1960 A.M.C. 1861 (Ore.) and authorities there cited. See, generally, Annotation, 110 A.L.R. 831 (1937). Where this claim is for damages resulting from injuries to another it is necessary to proceed by a separate suit, as in *States Steamship Co. v. Howard*, *supra*, or impleader, as in *Linday v. American President Lines*, 214 C.A. 2d 146, 29 Cal. Rptr. 465, 1963 A.M.C.

breach of his duty to Appellant, rather than merely a breach of his "duty" of safe conduct toward himself, and was, indeed, the only negligence of which there was evidence, the Court's finding that he was not guilty of negligence is erroneous and he is barred from recovery.

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### CONCLUSION

For the foregoing reasons, we submit that the Decree should be reversed with directions to enter a decree for Appellant.

Dated, San Francisco, California,  
January 12, 1966.

LILLICK, GEARY, WHEAT, ADAMS & CHARLES,  
GRAYDON S. STARING,  
ALF R. BRANDIN,  
*Attorneys for Appellant.*

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1899. In a case such as *Petition of Moore-McCormack Lines*, 164 F. Supp. 198, 1958 A.M.C. 1497 (S.D.N.Y.), it was necessary to proceed by cross-libels against the estates of the officers whose alleged negligence had caused the catastrophe, since the amounts claimed from the estates exceeded the amounts claimed by the estates. But in cases such as *Walker v. Lykes Bros. Steamship Co.*, *supra*, and the present case, where the employer's claim against the officer would be only co-extensive with the claim of the officer against the employer, there is no reason for such circuitry of action and the officer's breach of duty is treated simply as a defense.

## CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

GRAYDON S. STARING,

*One of Attorneys for Appellant.*

**(Appendix Follows)**



## **Appendix.**



## Appendix

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FEB 14 1967

No. 20,429

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

HUDSON WATERWAYS CORPORATION,  
a corporation,

*Appellant,*

vs.

WILLIAM J. SCHNEIDER,

*Appellee.*

Appeal from an Admiralty Decree of the United States  
District Court for the Northern District of  
California, Southern Division

Honorable Albert C. Wollenberg, District Judge

**BRIEF FOR APPELLEE**

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FILED

FEB 14 1967

WILLIAM E. LUCK, CLERK



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**United States Court of Appeals  
For the Ninth Circuit**

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HUDSON WATERWAYS CORPORATION, a corporation,	} <i>Appellant,</i>
vs.	
WILLIAM J. SCHNEIDER,	} <i>Appellee.</i>

---

Appeal from an Admiralty Decree of the United States  
District Court for the Northern District of  
California, Southern Division  
Honorable Albert C. Wollenberg, District Judge

**BRIEF FOR APPELLEE**

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A.

**JURISDICTION**

This Court has jurisdiction of this cause on the basis of the facts and authorities cited in Appellant's Opening Brief.

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B.

**STATEMENT OF THE CASE**

**I. Introduction.**

William J. Schneider, a marine engineer, suffered permanent injury to his nervous system when he

received a severe electric shock from latently defective equipment in the course of his work aboard appellant's ship. A final decree in admiralty in favor of Mr. Schneider for \$40,427.00 was entered upon findings of unseaworthiness of appellant's vessel and negligence of the corporate shipowner. The nature and extent of appellee's injuries and the amount of the award is not challenged here.

The appellant shipowner seeks reversal of the decree contending that (1) the vessel's warranty of seaworthiness did not extend to the appellee crew member as a matter of law; (2) there was no evidence of negligence on the part of the shipowner; and, (3) the Court erred in finding appellee free of contributory negligence.

The following statement of facts from the record and appellee's argument will demonstrate that the findings and decree in favor of appellee are based upon substantial evidence and are entirely consistent with applicable principles of maritime law.

## **II. Statement of the Facts Relating to the Issues of Unseaworthiness, Negligence and Contributory Negligence.**

Appellee, William J. Schneider, is a licensed marine engineer, 49 years of age and resides at Studio City, California. (Tr. 2, 5.) He was injured about 12:30 in the afternoon on January 27, 1964 in the course of his employment on board appellant's ship the SS. TRANSORLEANS, a T-2 Tanker. (Tr. 11-12, 14.) Mr. Schneider joined the ship at Stockton, California on January 15, 1964 and signed the Shipping Articles

at San Francisco the following day. (Appellant's Exhibit J, pp. 10-11.)<sup>1</sup> Appellee had never served on this vessel before. (Exh. J, p. 11.) At the time he was hurt, the ship was in navigable waters en route from San Francisco to Panama. (Tr. 11; Exh. J, p. 11.)

About noon on the date of the accident, appellee was directly ordered by the First Assistant Engineer to check the ship's service A.C. [alternating current] standby air compressor which had stopped running and to get it running again. (Tr. 12-13; Exh. J, pp. 11-12.) In obedience to these orders of his superior officer, Mr. Schneider first checked the main breaker switch on the master panel located on the operating platform (Tr. 102-103); he then proceeded to the place where the air compressor was situated near the middle of the control platform, one deck below the operating platform in the engine room. (Tr. 14.) The temperature in the engine room was about 105 to 110 degrees Fahrenheit; it was somewhat higher in the vicinity of the air compressor, and appellee was perspiring. (Tr. 14-15.) The platform on which appellee was standing was solid sheet metal. (Exh. J, p. 22.) He then noticed that the compressor was not operating and that its knife switch had been pulled into the "off" position. (Tr. 15; Exh. J, p. 18.) He then closed the knife switch but the unit did not start up. (Tr. 15; Exh. J, pp. 15-16.) Mr. Schneider next

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<sup>1</sup>Appellant's Exhibit J (hereinafter referred to as Exh. J) is the deposition of the appellee, W. J. Schneider, in evidence (Tr. 277-8, 281). This exhibit is not mentioned in Appellant's Opening Brief or in Appellant's Appendix thereto but it is part of this record on appeal.

reached for the manual control metal switch box in order to start the unit by tripping the manual trigger switch on the outside of this box. (Tr. 15; Exh. J, pp. 16-20.) As he reached for this switch, he noticed that the manual control box was unbolted and not properly secured to the air compressor. (Tr. 15-16; Exh. J, pp. 20-21.) When he touched the box with his left hand to steady it, he received a severe electrical shock (either 440 or 220 volts of alternating current) which knocked him back two or three feet. (Tr. 16-17.)

Appellee immediately reported the accident to his superior officers. (Tr. 17-18.) After resting topside for a few minutes, he disconnected the power to the unit by opening the knife switch, and then removed the cover of the control box from which he had received the electric shock. (Tr. 18-19.) The electric wires leading into the box which could be seen from the outside were insulated (Exh. J, pp. 24-25), but upon opening the box, the inside was found to be soaking wet and contained about a foot and a half of excess, old, corroded, bare wires, the exposed portions of which were touching the inside of the box. (Tr. 19; Exh. J, pp. 24-25.) Upon discovering these existing hazards inside the switch box, appellee corrected the defective conditions by drying out the interior of the box and removing the excess portions of the bare wires which were making contact with the metal inside. (Tr. 19.) He then hooked up the remaining wires properly and closed the box. He then put on the power to the compressor by closing

the knife switch and the unit started right up. (Tr. 19-20.)

Appellee acted in accordance with ordinary prudence under the circumstances as evidenced by the testimony of his expert witness, Charles A. Black, a Chief Engineer with thirty years experience at sea. (Tr. 282.) Mr. Black sailed as Chief Engineer on numerous T-2 tankers and was familiar with the type of air compressor unit here involved. (Tr. 283-284.) Mr. Black testified that when such unit was not working and an engineer was ordered to go down and get it running, it was usual, ordinary and customary practice to first check the main breaker switch to see that the power is on, next to engage the knife switch and if the unit does not go, then to engage the hand button and then trip the hand control switch. (Tr. 284-286.) It is also of record that it was not appellee's duty to check inside electric wiring on machinery prior to the accident; this was the duty of the ship's First Engineer. (Exh. J, p. 25.)

As a result of the electric shock from the defective switchbox appellee suffered serious organic and psychic damage to his nervous system for which the District Judge assessed an award of \$40,427.00. (District Court's Findings Nos. 11 through 23; R. 71, et seq.)<sup>2</sup>

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<sup>2</sup>Neither the nature and extent of appellee's resultant disability or the amount of the award is challenged on appeal by the shipowner.



## C.

**SUMMARY OF THE ARGUMENT**

Every crew member injured in the service of a live merchant ship is protected under the umbrella of the seaworthiness doctrine. The injured seaman does not assume the risk of latent dangerous conditions encountered in the course of his employment aboard his ship. The shipowner has an absolute, continuing and non-delegable duty to provide and maintain seaworthy equipment and safe working conditions on board its vessel. This duty cannot be shifted or delegated to the injured seaman under the guise of contributory negligence, or under the so-called "primary duty" rule. Determinations of unseaworthiness and negligence are normally questions of fact and should be sustained on appeal where the determination of the trial judge is not clearly erroneous. In addition, appellee was here entitled to the benefit of the doctrine of *res ipsa loquitur*. The record clearly sustains the trial court's finding of liability in this case.

## D.

**ARGUMENT****I. THE DISTRICT COURT WAS CORRECT IN HOLDING THE VESSEL'S WARRANTY OF SEAWORTHINESS EXTENDED TO LIBELANT.**

The appellant shipowner does not contend that the District Court erred in finding that a latently defective switchbox rendered its vessel unseaworthy. Appellant asserts that the doctrine of unseaworthiness did not extend to the appellee because he was sent to repair the equipment that caused his injury. Appellant also contends that the application of the warranty of seaworthiness depends on concepts of "reasonableness" and argues that it is not reasonable to apply the warranty to equipment which is "expressly represented" as unfit for service.

There are several fallacies in appellant's contentions.

Firstly, appellant assumes that a machine which is not running coupled with an order to get it going, is an "express representation" of unseaworthiness. This assumption rests on the mistaken notion that every machine or appliance that is not running is unseaworthy. At the time appellee was ordered by his superior officer to see what was wrong with the compressor and to get it going, neither the superior officer nor appellee knew of the dangerous condition which existed inside the switchbox. It was undetermined at that time whether someone had merely turned off the power to the unit or whether some minor mechanical adjustment was necessary to start up the compressor. Neither of these eventualities would amount to an unseaworthy condition unless it

were dangerous in some way. Questions of unseaworthiness are normally questions of fact<sup>3</sup> and the test of unseaworthiness is "whether under all the circumstances, the vessel was reasonably fit for libellant to carry out his job with reasonable safety." *Olsen v. Isbrandtsen Company, Inc.*, 209 F.Supp. 6, 8, 1963 AMC 927 (S.D., N.Y. 1962).

See:

*Mitchell v. Trawler Racer, Inc.* (1960), 362 U.S. 539, 80 S. Ct. 926, 9 L. Ed. 941;

*Michalic v. Cleveland Tankers, Inc.* (1960), 364 U.S. 325, 81 S. Ct. 6, 5 L. Ed. 2d 20.

Secondly, appellee was not engaged in actually repairing the switchbox at the time he was hurt. No repair had actually been commenced.

Thirdly, the duty to furnish a seaworthy vessel to seamen in the service of a live ship (in navigation) does not depend upon concepts of "reasonableness". Reasonableness is not the standard applied in determining whether a shipowner owes a duty to his *seamen* to furnish a seaworthy ship. The duty to furnish a seaworthy ship is absolute.

See:

*Gutierrez v. Waterman SS. Corp.* (1962), 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297;

*Mitchell v. Trawler Racer, Inc.* (1960), 362 U.S. 539, 80 S. Ct. 926, 9 L. Ed. 2d 941;

*Seas Shipping Co. v. Sieracki* (1946), 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099.

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<sup>3</sup>*Sentilles v. Inter-Caribbean Shipping Corp.* (1959), 361 U.S. 107, 80 S.Ct. 173, 4 L. Ed. 2d 142.

The duty exists where the shipowner has no knowledge of the defective condition;

See:

*Boudoin v. Lykes Bros. Steamship Co.* (1955),  
348 U.S. 336, 75 S. Ct. 382, 99 L. Ed. 354;

*Keen v. Overseas Tankship Corp.* (2nd Cir.  
1952), 194 F. 2d 515, cert. den'd 343 U.S. 966,  
96 L. Ed. 1362, 72 S. Ct. 1061.

and where the unsafe condition is created by another.

See:

*Grillea v. U. S.* (2nd Cir. 1956), 232 F. 2d 919;

*Lawlor v. Socony-Vacuum Oil Co., Inc.*, (2nd  
Cir. 1960), 275 F. 2d 599, cert. den'd (1960),  
363 U.S. 844, 4 L. Ed. 2d 1728, 80 S. Ct. 1614.

The duty to provide a seaworthy vessel and seaworthy equipment is not satisfied by the exercise of the utmost care or diligence by the shipowner.

See:

*Mahnich v. Southern SS. Co.* (1944), 321 U.S.  
96, 88 L. Ed. 561, 64 S. Ct. 455, 1944 AMC 1.

In *Grillea v. U. S.*, *supra* at p. 923, Judge Learned Hand commented on this subject as follows:

" . . . to the prescribed extent the owner is an insurer, though he may have no means of learning of, or correcting, the defect."

Appellee's injuries here were clearly occasioned by the shipowner's dereliction of duty to provide and maintain seaworthy equipment. By definition, the unsafe contents of the defective switchbox rendered the vessel unseaworthy as the trial Court so found.

II. ASSUMPTION OF THE RISK IS NOT A DEFENSE TO CASES  
BROUGHT UNDER THE JONES ACT OR THE GENERAL  
MARITIME LAW.

It has long been established that assumption of risk is not a defense to maritime torts.

See:

*Socony-Vacuum Oil Co. v. Smith* (1939), 305  
U.S. 424, 59 S. Ct. 262, 83 L. Ed. 265;

*Palermo v. Luckenbach S.S. Co.* (1957), 355  
U.S. 20, 78 S. Ct. 1, 2 L. Ed. 2d 3;

*Bryant v. Partenreederei-Ernest Russ* (4th Cir.  
1964), 330 F. 2d 185, 189, 1965 AMC 1207.

Upon analysis of appellant's argument that the shipowner is exonerated from liability for injury caused by defective equipment when the seaman is engaged in repairing the instrumentality of injury, it suddenly becomes apparent that this proposed theory is merely an attempt to revive the discredited doctrine of assumption of risk under a different label. Under appellant's theory, a member of the crew doing a ship's repair would not be covered by the warranty of seaworthiness even as to latent dangerous conditions encountered during the repair. According to appellant, it would make no difference how unsafe the equipment was; the employee must bear the burden of injury. In addition under appellant's theory, at the point where the shipowner instructed the seaman to inspect or repair the ship's equipment, the assertion is that the employer's duty ends. If such were true, the shipowner could thereby not only shift the risk of injury to its seamen, but could also absolve itself from its absolute duty of seaworthiness owed to all crew mem-

bers. Appellant's argument in this regard is clearly contrary to the maritime law.

The case of *Dixon v. United States* (S.D., N.Y. 1954), 120 F. Supp. 747,<sup>4</sup> is particularly pertinent here. In the *Dixon* case the facts were analogous to those presented here. There, a crew member on a live ship was ordered by his Captain to check a ladder which had been repaired a few hours before. While the seaman was checking the ladder, one of the rungs broke and caused him to fall. After the accident, it was discovered that shoreside repairmen, in replacing the defective rungs, had cut the new rungs too long and by forcing them in, had spread or sprung the two uprights to such an extent that the weld on some of the upper rungs was loosened, creating a latent defective condition. As in our case, the seaman (*Dixon*) was neither warned of the dangerous condition nor did he know or have any reason to believe that these upper rungs which gave way were latently defective. The shipowner in the *Dixon* case sought exoneration from liability for the unseaworthy condition of the ladder on the ground that it did not *at the time of the accident* furnish the defective ladder to libelant for his use. The shipowner maintained that since the libelant had been ordered by the Captain to inspect the very ladder which proved to be defective in order to see if the repairs had been made by the shoreside workers, said ladder "had been withdrawn

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<sup>4</sup>Remanded on appeal for further findings on negligence issue only, otherwise approved. *Dixon v. United States* (2nd Cir. 1955), 219 F. 2d 10, 18.



from use" until it could be determined by libelant that it was in fact seaworthy. This essentially is the same argument made by the appellant shipowner in the instant case.

In answer to this contention, the Court in *Dixon* held:

"However its various contentions are phrased, the respondent in substance seeks to defeat recovery by Dixon upon the defense of assumption of risk . . ." (120 F. Supp. p. 748.)

"The respondent seeks to carve out an exception to the doctrine of seaworthiness so as to make it inapplicable to a seaman who is ordered to inspect equipment to ascertain whether repairs have been made. Respondent assimilates Dixon's status to that of a repairman or shoreside mechanic specially engaged to restore an admittedly defective appliance to a seaworthy condition. Neither the facts nor the law supports its position. I hold on this record that libelant was neither warned of a dangerous condition nor did he know or have reason to believe that those upper rungs which gave way were grossly defective; but even if he had known, he did not in the performance of his duty, assume the risk of unseaworthy appliances." (120 F. Supp. 749.)

In the *Dixon* case, it is pertinent to note that the shipowner there also relied on *Bruszewski v. Isthmian S.S. Co.* (3rd Cir. 1947), 163 F. 2d 720, and *Byars v. Moore-McCormack Lines, Inc.* (2nd Cir. 1946), 155 F. 2d 587 (cited by appellant here). The Court in *Dixon* had no difficulty in distinguishing these cases on the ground that they involved *shoreside workers* engaged



to repair the very condition which caused their injuries and upon the further ground that the defective conditions involved in the *Bruszewski* and *Byars* cases, *supra*, were obvious and notorious. These distinctions are equally applicable to the instant case and also distinguish *West v. United States*, 361 U.S. 118, 1960 AMC 1959, and *Pinion v. Mississippi Shipping Co.* (E.D. La. 1957), 156 F. Supp. 652, 1957 AMC 2308, which were cited in Appellant's Opening Brief.<sup>5</sup>

In *Rodriguez v. Coastal Ship Corp.* (S.D., N.Y. 1962), 210 F. Supp. 38, a longshoreman was injured in the course of loading operations when he slipped in a pool of oil on a live ship. The oil came from the motor of a gantry crane mounted on the deck of the vessel. The ship was an experimental vessel, the first of its kind. On behalf of the shipowner, it was argued that the ship's crane, an innovation of seacoast transportation, was *sui generis* and still in the experimental stage; that an inevitable consequence of its function was spillage of oil; and that since seaworthiness is a relative concept, the vessel was reasonably fit under the circumstances.

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<sup>5</sup>Historically, the right to recover under the General Maritime Law or the Jones Act required that the libelant be a "seaman" (or one who does work traditionally done by the sailors of old) and that the act complained of occur while the ship is upon navigable waters. Thus appellant's reliance upon *McDaniel v. The Lisholt*, 257 F.2d 538, and *Raidy v. U. S.*, 153 F. Supp. 777, is as misplaced as its reliance upon *West v. U. S.* and *Byars v. Moore-McCormack Lines, Inc.*, since the courts have historically held that the warranty of seaworthiness does not apply once the factual determination has been made that either the libelant is not a seaman or that the injury occurred while the ship was not in navigation.

In rejecting this contention in the *Rodriguez* case the Court stated:

“... The plea, in effect, amounts to a negation of the “humanitarian policy” underlying the seaworthiness doctrine, and if accepted would revive the now discarded concept of assumption of risk. This Court is unaware of any current authority or doctrine in general maritime law which shifts to the worker the burden of the hazards created by the shipowner’s endeavors, experimental or otherwise, to increase the productive earning power of his vessel, thereby relieving the shipowner of his absolute duty to supply and maintain a seaworthy vessel and appurtenances. Indeed, to the contrary, the policy has been to assess the costs of the hazards of marine service, “insofar as it is measurable in money,” upon the shipowner and not the worker since he “\* \* \* is in a position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear the cost.” (Citations omitted.) The cost of experimental activities and improvement programs to the extent they create dangerous working conditions, must be borne by the shipowner and not the seaman.” (*Rodriguez v. Coastal Ship Corp.*, *supra*, pp. 42, 43.)

The sound principles expounded in *Rodriguez*, *supra*, are precisely applicable here. Just as the cost of experimental activities, to the extent that they create dangerous working conditions, must be borne by the shipowner and not the seaman, so also the shipowner, rather than the seaman, should bear the burden for injuries caused by latent dangerous conditions

encountered by the seaman in the course of inspection or repair.

See:

*Huff v. Matson Navigation Co.* (9th Cir. 1964),  
338 F. 2d 205.

In *Sprague v. Texas Co.* (2nd Cir. 1957), 250 F. 2d 123, a member of the crew of the SS. WYOMING was injured as a result of an unexpected eruption of steam from a water heater he was working on. At the time of injury, the pressure gauge indicated the absence of any water pressure in the heater. Since the valves of the heater were open and no water was flowing, it was assumed that no water under pressure remained in the heater. The Court of Appeals in the *Sprague* case concluded that it was inescapable that the valves or the gauges were not in proper working condition, and held that the trial court did not err in directing a verdict for the seaman on the issue of unseaworthiness.

See also:

*Van Carpals v. The S.S. American Harvester*  
(2nd Cir. 1961) 297 F. 2d 9; cert. den'd in  
*U.S. Lines v. Van Carpals* (1962), 369 U.S.  
865, 82 S. Ct. 1029, 8 L. Ed. 2d 84.

The foregoing authorities make it clear the Court below properly applied maritime law concluding that appellant's vessel, the S.S. TRANSORLEANS, was unseaworthy in this case and that the protection of the doctrine of seaworthiness applied to the appellee.

**III. THE TRIAL JUDGE'S DETERMINATION THAT APPELLEE'S INJURIES WERE PROXIMATELY CAUSED BY APPELLANT'S NEGLIGENCE IS SUPPORTED BY THE EVIDENCE AND IS NOT CLEARLY ERRONEOUS.**

**A. The Evidence Concerning the Defective Switchbox and the Circumstances Surrounding the Accident Are Sufficient to Support the Finding of Negligence.**

At the outset it should be noted that since the evidence justified the trial judge's finding of unseaworthiness, a discussion of negligence is not required. Where the action for unseaworthiness is available, its notion of liability swallows up any notion of maritime negligence, no matter how leniently conceived and there is no need to discuss negligence.

See:

*Redfern v. American President Lines, Ltd.*  
(9th Cir. 1965), 345 F. 2d 629.

*Clevenger v. Star Fish & Oyster Co.* (5th Cir.  
1963), 325 F. 2d 397, 402.

However, as appellee has already summarized, the evidence showed that the switchbox which caused the injury contained old, corroded, bare wires of an excessive length, a high degree of moisture condensation, and uninsulated portions of the wires touching the interior of the box. Further, it was shown to the satisfaction of the trial judge that appellee followed a standard prudent procedure in checking the equipment.

These facts alone are a sufficient predicate for the court's finding that the defective condition of the box contributed to appellee's injuries. The test of causation in seamen's injury cases is "whether the proofs

justify with reason the conclusion that the employer's negligence played any part, even the slightest, in producing the injury."

See:

*Ferguson v. Moore-McCormack Lines* (1957),  
352 U.S. 521, 1 L. Ed. 2d 511, 77 S. Ct. 457;  
*Varveris v. United States Lines Co.* (2d Cir.  
1957), 249 F. 2d 89.

See also:

*Coray v. Southern Pacific Company* (1949), 335  
U.S. 520, 93 L. Ed. 208, 69 S. Ct. 275;  
*Rogers v. Missouri Pacific Railroad Co.* (1957),  
352 U.S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443.

The trial court here could and did reasonably find that the old, corroded wires had existed for some time so as to have been discovered on reasonable inspection by the shipowner. By so finding, the trial court determined that the accident was due to more than a mere "malfunction in ship's gear" clearly distinguishing the present case from that of *Partenweederei, MS. Belgrano v. Weigel* (9th Cir. 1962), 299 F. 2d 897, cited by appellant.<sup>6</sup>

Illustrative of the Court's proper use of surrounding circumstances to find negligence or dereliction of duty is the case of *Olson Towboat Co. v. Dutra* (9th Cir. 1962), 300 F. 2d 883. Here a tugboat deckhand lost a portion of the index finger on the right hand as

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<sup>6</sup>The *Belgrano* case is also distinguished on the ground it involved non-crew members not engaged in traditional work of a seaman, hence the injury did not come under the umbrella of protection of warranty of seaworthiness.



he cast off a wire mooring line. The only evidence presented was that of the injured seaman who testified that as he let go of the line, something cut his finger. The shipowner contended that there was no showing of negligence. Circuit Judge Barnes, for this Court, affirmed the findings of negligence and unseaworthiness, observing as follows:

“At times circumstantial evidence is stronger than direct testimony based on powers of observation. Here appellee knows “something in the loop” caused his finger to be cut. The fact that a severe cut occurred as appellee let the loop go is strong evidence that the metal loop caused the cut, in the absence of some other factual circumstance. The wire loop was required to be handled. It was so handled, and according to plaintiff below, it injured him. No other explanation of how the injury took place, or that it did not take place, is inferred or suggested. Thus the *cause* of the injury is established by circumstantial evidence sufficient, in the absence of any other explanation, to be believed by a trier of fact. . . .

“Recognizing that the burden of proving both negligence and unseaworthiness rests upon libelant below, we think the uncontradicted facts and circumstances disclosed here by a careful reading of the short record before us establishes sufficient facts and circumstances surrounding the occurrence of the injury from which negligence may be inferred.” (*Dutra*, supra, p. 884.)

All the facts and circumstances presented in the present case were of course considered by the trial judge. He could reasonably infer that the old, cor-

roded, bare condition of the wire inside the switchbox did not occur, or come about between 8 and 12 o'clock on the morning of the accident. These conditions, as found by the trial Court, were of long standing and should have been discovered by the shipowner in the exercise of reasonable care. For example, in *Williamson v. Roen Steamship Co.* (E. D. Wis. 1957), 149 F. Supp. 787, 788, the proofs established that the plaintiff was solely in charge of a barge upon which he was injured when he fell through her rotted deck. The court said "the evidence is undisputed that the deck that plaintiff fell through was rotten. The jury might well have considered that this is something that would not likely have occurred between the beginning of navigation in April, 1953 and June 4, 1953."

In *Interocean SS. Co. v. Topolofsky* (6th Cir. 1948), 165 F. 2d 783, 1949 AMC 198, a crew member was injured aboard his ship as a result of a defective step on a stairway. The seaman testified that after the accident he saw that two bolts were missing from the step. This was the only evidence and testimony bearing on the question of negligence. The court held that:

"Whether such defect existed, and, if it did, whether appellant knew of, or should have known of, or discovered, this dangerous defect in the step, was a question for the jury.

"... Reasonable inferences could be drawn that appellant was negligent in not discovering such defect by the exercise of a high degree of care in making such inspections as were required for the

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<sup>7</sup>See also: *Rodriguez v. Texas Co.* (2nd Cir. 1958), 254 F. 2d 295.



safety of its seaman and in keeping with its duty to furnish a safe place in which to work (citing authorities).” (*Topolofsky*, supra, p. 784.)

As Mr. Justice Black observed in *Schulz v. Pennsylvania Railroad Co.* (1956), 350 U.S. 523, 76 S. Ct. 608, 610, 100 L. Ed. 668, 1956 AMC 737:

“... negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre.” (350 U.S. 525.)

“... Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.” (350 U.S. 526.)

It is of course for the trier of fact to determine from all the proven circumstances whether negligence exists. The defective condition of the wiring which appellee found inside the switchbox after the accident, clearly warranted the court's finding of negligence on the shipowner's part in this cause.

**B. The Doctrine of Res Ipsa Loquitur Also Supports the Finding That Negligence on the Shipowner's Part Was a Competent Producing Cause of the Accident.**

As indicated, there is ample evidence contained in the record to sustain a finding of negligence on the part of the appellant, without resort to the doctrine of *res ipsa loquitur*.

However, the inference of negligence derived from the doctrine of *res ipsa loquitur* was available to appellee on the proven facts, and the Court's finding of negligence of the shipowner on this basis is an alternative ground to sustain the decree.

In this connection it should first be noted that it was undisputed that prior to the accident, appellee had no duty to check the electrical wiring inside the switchbox; that was the duty of the ship's First Engineer. (Exh. J, p. 25.) Secondly in carrying out the orders of his superior officer, the Trial Court found that appellee's own conduct was prudent and did not contribute to his injury.<sup>8</sup> Once the trial court determined that appellee's actions did not culpably contribute to his injury, it is proper to utilize the doctrine of *res ipsa loquitur* and find, by inference, that appellant's breach of duty was the most plausible explanation of the accident.

On the facts here, this case would clearly come within the holding of *Furness, Withy & Co. v. Carter* (9th Cir. 1960), 281 F. 2d 264. In the *Carter* case, a deckhand was attempting to remove a hatch cover with a three foot long steel bar when the bar slipped out of its groove hitting the seaman on the side of his head. Judge Bone for this Court held that the accident was unusual; the appellee was guilty of no conduct which contributed to the accident; that he had no control over the hatch cover and that such a state of facts "is clearly one in which the inference of *res ipsa*

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<sup>8</sup>Obedience to orders of a superior aboard ship cannot constitute contributory negligence. *Darlington v. National Bulk Carriers* (2nd Cir. 1946), 157 F. 2d 817.

could permissibly have been drawn by a jury. That is, while not compelled to infer negligence, a jury would be permitted to do so." (281 F. 2d p. 266.)

In utilizing the doctrine of *res ipsa loquitur* to infer negligence under such circumstances, the Court in *Carter* relied upon *Jesionowski v. Boston & Maine R.R.* (1947), 329 U.S. 452, 67 S. Ct. 401, 91 L. Ed. 416. There the action was brought under the Federal Employers Liability Act (45 U.S.C. 51 et seq.) for the death of a brakeman in a derailment at a switch operated by the deceased. Defendant's proofs indicated that the accident was caused by the decedent's own negligence in throwing the switch but the jury rejected this evidence and found the defendant negligent. The Court of Appeals for the First Circuit reversed the judgment for the plaintiff on the ground that *res ipsa loquitur* applies only where the defendant has exclusive control—lacking here since the deceased had immediate control over the switch. The Supreme Court reinstated the plaintiff's judgment, stating that if *res ipsa* were limited as it was by the First Circuit, it "would bar juries from drawing an inference of negligence on account of unusual accidents in all operations in which the injured person himself participated in the operations, even though it was proved that his operations of the things under his control did not cause the accident." (*Jesionowski v. Boston & Maine R.R.* *supra*, p. 457.)

The Supreme Court, through Mr. Justice Douglas, also had occasion to comment on the scope of the doctrine of *res ipsa loquitur* in *Johnson v. United*

*States* (1948), 333 U.S. 46 at p. 49, 68 S. Ct. 391, 92 L. Ed. 468, as follows:

“No act need be explicable only in terms of negligence in order for the rule of *res ipsa loquitur* to be invoked. The rule deals only with permissible inferences from unexplained events.”

As Judge Bone pointed out in the *Carter* case, *supra*, that *Johnson v. United States* and *Gilmore & Black* (1957 Ed.), Admiralty, Sections 6-36, propound a “broader *res ipsa* rule for admiralty cases than that which applies in situations outside of admiralty law.” (*Furness, Withy & Co. v. Carter*, *supra*, p. 266, n.2.)

In the instant case, the unusual accident to which appellee did not contribute coupled with the shipowner's overall control of the instrumentality of injury clearly warranted an inference under the *res ipsa* doctrine that some dereliction of duty by the shipowner caused appellee to suffer the electrical shock from the latently defective switchbox on appellant's ship.

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#### IV. THE APPELLEE WAS NOT CONTRIBUTORILY NEGLIGENT.

It is difficult to determine from Appellant's Opening Brief whether the shipowner is contending that Mr. Schneider was guilty of contributory negligence as a matter of law or whether appellant is urging that the sole cause of injury was a breach of some contractual duty which appellee owed to his employer, since appellant labels his argument “Contributory Negligence” but argues an entirely different theory. Consequently, we will discuss both the contributory negligence question which is suggested by the title,

and the distinct "primary duty" question which is argued by appellant.

**A. The Trial Judge's Determination That Appellee's Injuries Were Not Proximately Caused by His Own Negligence Is Supported by Substantial Evidence, and Is Not Clearly Erroneous.**

Contributory negligence was asserted by appellant and rejected by the Court below.

The applicable standard in deciding whether damages should be reduced by one's own fault is whether appellee acted as a reasonably prudent man under similar circumstances.

See:

*Ktistakis v. United Cross Navigation Corp.*  
(2nd Cir. 1963), 316 F. 2d 869, 1963 AMC 1211;

*Aivaliotis v. SS. Atlantic Glory* (E.D. Va. 1963), 214 F. Supp. 568.

The trial Court's factual determination that Mr. Schneider was not guilty of contributory negligence is conclusive on appeal unless "clearly erroneous".

See:

*Redfern v. American President Lines, Ltd.*  
(9th Cir 1965), 345 F. 2d 629.

The record contains ample evidence from which it can reasonably be inferred that appellee's actions were consistent with those to be expected of a reasonably prudent person acting under similar circumstances.

Appellee was not told what was wrong with the air compressor. (Exh. J, p. 11.) He was instructed by the



First Engineer to go down and see what was wrong with it and to get it going. There were no gauges or other indicators on the compressor unit to indicate or warn Mr. Schneider that a circuit might be broken or defective. (Exh. J, p. 18.) There is no evidence that would indicate that appellee knew or should have known of the dangerous condition which he was about to encounter. Mr. Black, appellee's expert witness, testified that the procedure Mr. Schneider followed was in conformity with usual and standard practices under the circumstances. (Tr. 284-287.) The opinion of appellant's expert merely created a conflict in the evidence which was resolved against the shipowner by the trial judge.

On disputed questions of fact or credibility of witnesses, the decision of the trial judge is controlling.

See:

*Guzman v. Pichirilo* (1962), 369 U.S. 698, 82 S. Ct. 1095, 8 L. Ed. 2d 205;

*Gypsum Carrier, Inc. v. Handelsman* (9th Cir. 1962), 307 F. 2d 525, 1963 AMC 175.

It was appellant's duty to provide Mr. Schneider with a safe place in which to work and any attempt to shift this duty to appellee under the guise of contributory negligence is contrary to maritime law.

See:

*Michalic v. Cleveland Tankers, Inc.* (1960), 364 U.S. 325, 81 S. Ct. 6, 5 L. Ed. 2d 20;

*Cox v. Esso Shipping Co.* (5th Cir. 1957), 247 F. 2d 629.

It is apparent that the trial judge deemed Mr. Schneider's actions in the performance of his assigned duty well within the standard of a reasonably prudent seaman and appellant did not sustain its burden of proof on the issue of contributory negligence in this cause.

**B. The "Primary Duty" Rule Should Be Laid to Rest; In Any Event It Is Not Applicable Here.**

Appellant argues that *Walker v. Lykes Bros. Steamship Co.* (2nd Cir. 1952), 193 F. 2d 772, should govern here to bar appellee's recovery. In relying on this 1952 case from the Second Circuit, appellant has apparently overlooked the observations of Judge Waterman in *Dunbar v. Henry DuBois' Sons Co.* (2nd Cir. 1960), 275 F. 2d 304, in which he points out that since the *Walker* decision, other Courts have obviated, distinguished, blunted and in various ways debilitated the waning authority of that flawed doctrine—"The Primary Duty Rule". Thus, the very circuit that proposed the primary duty rule and gave it life in *Walker*, now criticizes it and indicates its final resting place by observing that such doctrine "is incompatible with the Congressional mandate that contributory negligence and assumption of risk shall not bar a recovery in a Jones Act case."<sup>9</sup> (*Dunbar v. Henry DuBois' Sons Co.*, supra, p. 306.)

The *Walker* case and the so-called "primary duty rule" which it espouses has been subject to consider-

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<sup>9</sup>It should be noted that only Judges Clark and Waterman agree in this regard whereas Judge Hincks avoided the question by distinguishing *Dunbar* from *Walker*.



able criticism,<sup>10</sup> and its application has been severely limited.<sup>11</sup> Even in its own circuit, the case has been expressly distinguished,<sup>12</sup> and a growing number of Courts are refusing to follow *Walker*.<sup>13</sup>

Even if it is assumed *arguendo* that the *Walker* doctrine still breathes, appellant failed in its burden of proving that appellee, the Third Assistant Engineer, was the ship's officer charged with the primary duty to inspect, repair and maintain the electrical system in question. Appellant produced no evidence to establish that appellee was in charge of the electrical equipment involved here, nor did the shipowner establish that Mr. Schneider was primarily responsible to his employer for failing to inspect the inside of the switchbox. The mere fact that Mr. Schneider was on watch and made a routine tour of inspection of the engine room (which room included the compressor unit) a few hours before the accident, does not establish, as appellant assumes, that Mr. Schneider had a duty to inspect the wiring *inside* the switchbox. To carry appellant's reasoning in this regard to its logical conclusion, according to the shipowner, any

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<sup>10</sup>See: *Boat Dagney, Inc. v. Todd* (1st Cir. 1955), 224 F. 2d 208, 1955 AMC 2083, 65 Harvard Law Review 1238 (1952); 62 Yale Law Review 111 (1952).

<sup>11</sup>See *Mason v. Lynch Bros. Co.* (4th Cir. 1956), 228 F. 2d 709, 1956 AMC 394;

*Spero v. Steamship The Argodon* (E.D. Va. 1957), 150 F. Supp. 1, 1957 AMC 1056;

*Chesapeake & Ohio RR. v. Newman* (6th Cir. 1957), 243 F. 2d 804.

<sup>12</sup>*Dixon v. United States* (2nd Cir. 1955), 219 F. 2d 10.

<sup>13</sup>*Ktistakis v. United Cross Navigation Corp.* (2nd Cir. 1963), 316 F. 2d 869.

engineer on watch under these circumstances would be barred from recovery for injury resulting from any dangerous condition in the engine room.

On the other hand, there was the uncontradicted testimony of Mr. Schneider, placed in evidence by opposing proctors, that it was the duty of the First Engineer and not appellee's duty to inspect the wiring (Exh. J, p. 25.) This evidence alone would prevent the application of the so-called "primary duty rule" and clearly distinguishes this case from *Walker* on the facts.

In the *Petition of Moore-McCormack Lines* (S.D. N.Y. 1958), 164 F. Supp. 198, 217, 1958 AMC 1497 one issue was whether the First Mate had the duty of properly loading cargo. The Court found that the duty was that of the Master. The fact that the Master had assigned the task of supervising the loading to the First Mate did not place the "primary duty" for such loading on the Mate.

In *Spero v. Steamship The Argodon* (E.D. Va. 1957), 150 F. Supp. 1, the First Assistant Engineer upon leaving the ship's engine room told the Third Engineer to watch the Second who was a new man. The Third fell on oil of which he had prior knowledge. The Court said: "Clearly the doctrine [*Walker*] cannot be extended to a Third Engineer not primarily charged with the duty of keeping oily substances from the engine room." (*Spero v. Steamship The Argodon*, supra, p. 3.)

Perhaps the best way to dispose of the *Walker* doctrine is to frankly state that it was erroneously

conceived and it should not be permitted to perpetuate the initial mischief which it has caused in both maritime and railroad law.

Although appellant alludes to F.E.L.A. cases<sup>14</sup> in the Opening Brief upon which it claims the "doctrine [primary duty rule] rests abundantly", it should be noted that since 1939 the primary duty rule has been discarded in F.E.L.A. cases.

See:

*Louisiana & Arkansas RR. Co. v. Johnson* (5th Cir. 1954), 214 F. 2d 290, 292, citing the United States Supreme Court decision in *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63, 64, 63 S. Ct. 444, 446, 87 L. Ed. 610, holding:

"... Following the enactment of the 1939 amendment [to FELA] the Supreme Court held that 'every vestige of the doctrine of assumption of risk was obliterated from the law' and that the 'primary duty rule' in . . . *Davis v. Kennedy*<sup>15</sup> had been 'swept into discard'".

Since the Federal Employers Liability Act (45 U.S.C. §51) is expressly incorporated into the Jones Act<sup>16</sup> under which this action was commenced, it would seem that both the *Tiller* and *Johnson* cases,

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<sup>14</sup>See page 21 of Appellant's Opening Brief. The F.E.L.A. cases upon which appellant apparently relies were all decided prior to the 1939 Amendment of the Federal Employers Liability Act.

<sup>15</sup>*Davis v. Kennedy*, 266 U.S. 147, was decided in 1924, 45 S. Ct. 33, 69 L. Ed. 212.

<sup>16</sup>Jones Act (46 U.S.C. 688).

supra, are direct authority for discarding the primary duty rule here.

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**E.**

**CONCLUSION**

For the foregoing reasons, it is submitted that the decree of the District Court should be affirmed with interest and costs to appellee.

Dated, San Francisco, California,  
February 11, 1966.

Respectfully submitted,

JARVIS, MILLER & STENDER,  
MARTIN J. JARVIS,  
*Proctors for Appellees.*

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**CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARTIN J. JARVIS,  
*Proctor for Appellee.*

FEB 14 1967

No. 20,429

IN THE

United States Court of Appeals  
For the Ninth Circuit

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HUDSON WATERWAYS CORPORATION,

*Appellant,*

VS.

WILLIAM J. SCHNEIDER,

*Appellee.*

APPELLANT'S REPLY BRIEF

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No. 20,429

IN THE

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## For the Ninth Circuit

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HUDSON WATERWAYS CORPORATION,  
*Appellant,*

vs.

WILLIAM J. SCHNEIDER,  
*Appellee.*

### APPELLANT'S REPLY BRIEF

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#### THE FACTS

Although the statement of facts in Appellee's Brief shows a general agreement with the facts stated in our Opening Brief, certain statements of the Appellee require correction or clarification.

Appellee states (Brief pp. 17, 19) that the trial court found that the condition of the switch box was of long standing. Actually there was no such finding by the trial court and no evidence upon which such a finding could have been based.

Appellee lays considerably more stress upon a statement, repeated three times (Brief pp. 5, 21, 28), that it was not his duty to check the wiring inside the switch box prior to the time when he was assigned to find the

trouble and repair it, but the duty of the First Assistant Engineer. It is not Hudson Waterways' position at all that Schneider had a duty to check the *interior* wiring prior to the time when trouble was reported. To say, however, that it was the duty of the First Assistant Engineer to do so is to exercise great liberality with the testimony upon which Appellee relies in his own deposition (Exh. J, p. 25) where the question and answer were simply:

“Q. Who would have that duty to check the electrical equipment?

A. Oh, I'd say the first engineer, probably years ago.”<sup>1</sup>

Finally, it is disingenuous of Appellee, after acknowledging that he, as an officer, had been sent to see what was wrong with the compressor and get it going, to suggest (Brief, p. 7) that he might have supposed that the reason the compressor was not running was simply that someone had turned off the power.

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<sup>1</sup>The statement (Appellee's Brief p. 28) that this testimony was placed in evidence by Hudson Waterways likewise overreaches. Exhibit J, Schneider's deposition, was introduced (Tr. 278) by Hudson Waterways' counsel for the purpose of reading certain testimony (Tr. 278-281) not including the portion relied on here by Appellee, whose counsel then introduced the remainder by asking that the entire deposition be deemed read (Tr. 281).

**ARGUMENT****I****THE WARRANTY OF SEAWORTHINESS DOES NOT APPLY IN  
THE CIRCUMSTANCES OF THIS CASE****A. The Contention That Reasonableness Is Not Involved in the  
Warranty of Seaworthiness Is Plainly Error.**

Appellee urges that the warranty of seaworthiness is not subject to standards of reasonableness and argues this on the basis of the well-known statement that the duty is "absolute." But the term "absolute," as used in the context of *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 1960 A.M.C. 1503 and other leading cases clearly means only to indicate that the duty is not subject to care or the lack of it on the part of the shipowner. The *Mitchell* case itself, however, makes it clear by repetition that reasonableness is a key ingredient of the warranty:

"What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service." 362 U.S. at 550, 1960 A.M.C. at 1512.

**B. The Supposed Distinction Between Seamen and Harbor  
Workers in the Application of the Warranty of Seaworthi-  
ness Is Unfounded.**

In contending that the shipowner warrants the non-existence of a defective condition which a qualified man is engaged and directed to find and repair, Appellee seeks

to distinguish the authorities relied upon by Appellant on the ground that the cases involved harbor workers and to set up a distinction of treatment between the harbor workers and seamen in this regard. But the fundamental authority by which the seaman's warranty is extended to harbor workers clearly makes such a distinction untenable. The harbor worker acquired the warranty of seaworthiness under the doctrine laid down in *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85, 1946 A.M.C. 698. The Supreme Court in that case stressed the complete parallelism between seamen and longshoremen in connection with the warranty of seaworthiness in such language as this:

“[W]hen a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights.” 328 U.S. at 97, 1946 A.M.C. at 706.

Again, when the Supreme Court looked back at the *Sieracki* case in *Pope & Talbot v. Hawk*, 346 U.S. 406, 413, 1954 A.M.C. 1, 9, its view was the same and, in speaking of seamen and harbor workers, the court reaffirmed that “All were entitled to like treatment under law.”

The sole authority upon which Appellee relies for a distinction between seamen and harbor workers is a District Court case in which the rule involved here was plainly not applicable to the facts.<sup>2</sup> Strong evidence that

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<sup>2</sup>In *Dixon v. United States*, 120 F.Supp. 747, 1954 A.M.C. 966 (S.D.N.Y.), on which Appellee relies, there is scarcely even a superficial resemblance to the present case or to the cases relied



no such distinction is observed by the Supreme Court is to be found in the cases where the warranty is denied because the vessel is out of navigation. The refusal to apply the warranty to the vessel in such cases is a general extension to the whole vessel of the more limited rule upon which Appellant relies here. In *Roper v. United States*, 368 U.S. 20, 1961 A.M.C. 2499, a longshoreman's suit in which recovery was denied because the vessel was found to be out of navigation, the court drew the parallel with cases like *West v. United States*, 361 U.S. 118, 1960 A.M.C. 15 (1959) and, in denying the warranty of seaworthiness to the longshoreman, relied directly upon its own earlier holding in a seaman's case, *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 1952 A.M.C. 12.

### C. Assumption of Risk Is Not Involved Here.

We agree wholeheartedly that the doctrine of Assumption of Risk, to the extent that it describes anything not comprised in contributory negligence, is not a defense in seamen's and longshoremen's cases. The attempt, however, to equate the rule relied on by Appellant with the doctrine of assumption of risk is utterly misconceived. It is evidently based again upon the single District Court case of *Dixon v. United States*, 120 F.Supp. 747, 1954 A.M.C. 966 (S.D.N.Y.), which was not analogous on its facts to the present case and in which the defense of as-

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on by Appellant. In *Dixon* it was represented to the mate that three rungs at the bottom of a ladder had been repaired and he was asked to check the repairs. As he went down the ladder for the purpose of checking the rungs at the bottom, different rungs higher up gave way and he fell. Thus the appliance was represented to him as repaired and he was evidently sent to check the quality of the repairs and was injured by entirely different defects than he was told had originally existed.

sumption of risk was urged and discussed together, and in confusion, with a contention that the warranty of seaworthiness did not apply.

The essential element of an assumption of risk is the injured man's exercise of a choice to proceed under a known risk.<sup>3</sup> This element is not involved in the contention that the warranty of seaworthiness does not apply, even though the facts here do involve similar conduct in Schneider's turning on the power before experimenting with the broken box. The rule relied on by Appellant has nothing to do with the assumption of risk as a defense, or with any other defense, but rather with the existence of the basic right, a right as to which Appellee's analysis only begs the question. The rule does not concern an injured man's knowledge of a breach of duty to him and his implied willingness to bear the consequences, but rather the existence of a duty in the first place based upon whether the equipment involved is held out to be free from defect.

#### **D. Appellee's Authorities Are Not Applicable.**

We have already pointed out (footnote 2, *supra*) that the case of *Dixon v. United States*, *supra*, turns upon very different facts than the present case. *Sprague v. Texas Company*, 250 F.2d 123, 1958 A.M.C. 67 (2d Cir. 1957) and *Van Carpals v. the SS American Harvester*, 297 F.2d 9, 1962 A.M.C. 395 (2d Cir. 1961), the other two cases which Appellee cites as presenting somewhat parallel fact situations, are likewise readily distinguishable. Neither of those cases involved the repair of the defect

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<sup>3</sup>See, e.g., 38 Am. Jur. Neg. Sec. 171, 173.

or condition which rendered the vessel unseaworthy. Instead, each of them involved the existence of steam pressure in a line when the pressure should have been completely relieved to permit the opening of the line or equipment attached to it. In the *Sprague* case some work was to be done which required opening a tank which, when it was opened, gave out hot water and steam; the defective condition consisted of the existence of pressure where it should not have been and the failure of the pressure gauge to show it. In the *Van Carpals* case no repairs were to be made at all but a valve was to be opened to permit Coast Guard inspection of its interior, and again the line pressure had not been relieved. In each case the improper condition could and should have been alleviated before the work was done. The only analogy of those cases to the present case lies in the fact that here the electric power was on, as the steam pressure was in those cases. But here, in contradistinction to those cases, it was the injured man himself who was responsible for that condition.

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## II

### THE FINDING OF NEGLIGENCE IS UNSUPPORTED

#### A. The Evidence Was Inadequate to Hold Appellant for Negligence.

We have fully discussed in our Opening Brief the inadequacy of the evidence to supply the finding of negligence. Appellee counters with certain materials relating to causation, which is not in question here, and with the statement that the District Court could and did find that

the condition had existed for some time so as to have been discovered on reasonable inspection by the shipowner. This statement is entirely unfounded as there is no such finding by the trial court and, as we pointed out in our Opening Brief, there was no evidence upon which such a finding could have been made. Appellee further responds to this point by citing and quoting from certain cases in which the records were reviewed and found sufficient to support the judgments. But here we are dealing with a specific record and it seems difficult for Appellee to draw any comfort from cases on unrelated fact situations in which the courts were reviewing records not available here. To the extent that those cases imply that other courts would indulge in speculation or follow a lower standard than this court has applied, *e.g.*, in *The Belgrano*, 299 F.2d 897, 1962 A.M.C. 1327 (9th Cir.), they would scarcely seem controlling in the present case.

#### **B. The Doctrine of Res Ipsa Loquitur Does Not Apply.**

Irrespective of the nature of the particular act, omission or circumstance from which the injury resulted, the courts have almost uniformly allowed or denied the recovery of damages depending upon whether or not the facts of the case disclosed the essential elements necessary for the application of the *res ipsa loquitur* doctrine. *Furness, Withy & Co., Ltd. v. Carter*, 281 F.2d 264, 1960 A.M.C. 1784 (9th Cir.), the one case from this Court which Appellee cites, is opposed to his contention. In the *Furness, Withy* case this Court held that the *res ipsa loquitur* doctrine may be applied only when the plaintiff has demonstrated that: (1) the accident probably would not have occurred in the absence of negligence;

(2) the instrumentality causing the injury was, at the time of the accident, under the exclusive control of the defendant; and (3) plaintiff's conduct does not impair the inference of negligence in any way. See also 2 Harper & James: *Torts*, Sec. 19.5, at p. 1081 (1956). If any of these requirements is not met no liability attaches to a ship-owner under the *res ipsa loquitur* doctrine.

Admitting, arguendo, that the accident involved in this case "probably would not have occurred in the absence of negligence," the facts do not establish the second and third elements necessary to invoke the doctrine. There is no basis for the application of the doctrine when the thing that caused the injury is under the control and management of the injured party. In *Asproditis v. Standard Fruit and Steamship Co.*, 108 F.2d 728, 1940 A.M.C. 22 (5th Cir.) the plaintiff brought an action under the Jones Act to recover damages for the death of an engineer who was scalded by steam when a pipe pulled loose from a flange connecting it to one of the boilers. Noting that the engineer was on watch at the time the accident occurred and was charged with the duty of seeing that all steam pipes and other fittings were operating properly, the court held that the doctrine of *res ipsa loquitur* did not apply since the thing that caused the injury was under the control and management of the injured party at the time of the accident.

The plaintiff's own conduct must play no part in the mechanics of the accident so as to complete the basis for an inference that the defendant was in control of all factors which might have caused the accident. This requirement cannot be satisfied where the plaintiff's duties

or actions involved him in the functional performance of the instrumentality causing the injury and where, from the facts, it is impossible to exclude the possibility that the accident was due to plaintiff's own negligence. *Seville v. United States*, 163 F.2d 296, 298, 1948 A.M.C. 371, 372 (9th Cir. 1947) ("the accident as well may have been caused by the failure to avoid it as by the negligence of the injured man's fellow workmen"); *Petition of McAllister*, 53 F.2d 495, 501, 1931 A.M.C. 2003, 2004 (S.D. N.Y.); *Asprodites v. Standard Fruit and Steamship Co.*, *supra*. See also 1 A.L.R. 3rd 648, 649. Even ignoring for the moment the other aspects of Schneider's control and participation here, the unquestioned fact is that he turned on the power which made the compressor dangerous and the injury possible.

The force and effect of the doctrine of *res ipsa loquitur* is set forth in *Geotechnical Corp. of Delaware v. Pure Oil Co.*, 196 F.2d 199, 205, 1952 A.M.C. 727, 735 (5th Cir.), where the court stated:

"[T]he doctrine as expounded by the Supreme Court, and to be applied in admiralty, has less potency than is given it in some other courts. It suffices to cite three recent cases: *Sweeney v. Erving*, 228 U.S. 233; *Jesionowski v. Boston & Maine Railroad*, 329 U.S. 452; *Johnson v. United States*, 333 U.S. 46, the last suit in admiralty. The effect of them is to hold that the doctrine is not a rule of law, but a principle of evidence, useful to aid in making a *prima facie* case, but that it does not change ultimately the burden of proof on the plaintiff to show negligence in the defendant; and when the evidence is all in, the question still is whether all the evidence, in light of common experience, reasonably



shows that the defendant was negligent in some respect that caused the injury, though the particular negligence cannot be pointed out or directly proved.”

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### III

#### APPELLEE IS BARRED BY HIS OWN NEGLIGENCE

##### **A. A Finding of Appellee's Own Breach of Duty Is Required by the Court's Other Findings.**

Appellee ignores the point of our contention with respect to his negligence. He argues from a portion of the evidence in an effort to show ordinary care on his part, but does not relate his argument to the District Court's finding, in effect, that some unspecified employee(s) of Hudson had been negligent. Appellant's point is quite simply that Schneider cannot dissociate himself from the District Court's finding of negligence since that finding is based on a failure to discover and correct the condition of the pressure regulator and the record shows no one who had a better opportunity to discover this condition than Schneider himself and shows that such inspections of the equipment as were thought necessary, both at the time he undertook to repair it and while he was on watch just previously, were made by him as a part of his duty.

We have already pointed out that it seems less than candid for Schneider to suggest that he might have supposed that the compressor was simply turned off and not broken down. Even apart from his prior inspections of the equipment, in which he did not observe that the box was tilted off its mounting, it is difficult to understand



the contention that he is free of negligence and thus absolved of fault, when he approached a piece of gear known to be defective, found himself protected by the power's having been turned off and then, without inquiry or examination to find out the reason for this, turned it on again and made the gear dangerous.

**B. Appellee's Breach of Duty Is of the Type for Which Appellant Has a Cause of Action and It Therefore Bars Appellee's Recovery.**

Appellee attempts to dispose of the effect of his negligence by placing a very misleading label upon the rule, represented by *Walker v. Lykes Bros. Steamship Co.*, 193 F.2d 772, 1952 A.M.C. 269 (2d Cir.), that the failure of an officer to perform the work for which he is hired is not mere contributory negligence which diminishes recovery but a breach of his contract which bars recovery entirely by a complete offset of damages. The meaning of the "primary duty" label is far from clear. The term seems to have appeared in certain cases involving breach of a company rule as a contributing factor to injury, while other such cases were dealt with formerly as cases of assumption of risk. This confusion was carried over and compounded in one of the cases which Appellee cites in which the *Walker* case was discussed.<sup>4</sup>

Appellee advances a number of cases in which the *Walker* rule was not applied. In two of these cases the rule was rejected.<sup>5</sup> In four cases the rule was not found

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<sup>4</sup>*Boat Dagny, Inc. v. Todd*, 224 F.2d 208, 1955 A.M.C. 2083 (1st Cir.).

<sup>5</sup>*Boat Dagny, Inc. v. Todd*, *supra*; *Dunbar v. Henry DuBois' Sons Co., Inc.*, 275 F.2d 304, 1960 A.M.C. 1393 (2d Cir.).

applicable to the particular facts.<sup>6</sup> And in one case the rule was not mentioned and had no possible application.<sup>7</sup>

It is not surprising that Appellee should find comforting words in some of these cases, such as the *Dunbar* case, since it appears that in none of them, apart from *Dixon v. United States*, 219 F.2d 10, 1955 A.M.C. 498 (2d Cir.), did the courts understand the basis of the *Walker* rule.<sup>8</sup> Only in the *Dixon* case, where the rule was not applicable to the facts because Dixon had not breached any duty to his employer, did the Court (speaking through Judge Harlan) disclose an understanding of the rule. The Court said in that case:

“Cases such as *Walker v. Lykes Bros. S.S. Co.*, 1952 A.M.C. 269, 193 F.(2d) 772 (2 Cir.); *Great Northern Railway Company v. Wiles*, 240 U.S. 444 (1916), and other cases of the same tenor which the appellant cites, are in no way inconsistent with the rule that assumption of risk is not a defense or comparable to the situation before us. Those cases are only instances of the firmly established rule that an employee may not recover against his employer for injuries occasioned by his own neglect of some independent duty arising out of the employer-employee

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<sup>6</sup>*Dixon v. United States*, 219 F.2d 10, 1955 A.M.C. 498 (2d Cir.); *Mason v. Lynch Bros. Co.*, 228 F.2d 709, 1956 A.M.C. 394 (4th Cir.); *Chesapeake & Ohio RR. v. Newman*, 243 F.2d 804, 1957 A.M.C. 2369 (6th Cir.); *Spero v. The Argodon*, 150 F.Supp. 1, 1957 A.M.C. 1056 (E.D.Va.).

<sup>7</sup>In *Ktistakis v. United Cross Navigation Corp.*, 316 F.2d 869, 1963 A.M.C. 1211 (2d Cir.) the judgment was quite properly reversed because an officer had been charged with 50% contributory negligence on the basis that a defective condition was within an area of the vessel for which he had a general responsibility but without the slightest showing that he had neglected his responsibility.

<sup>8</sup>The point was likewise not grasped in the law review notes cited by Appellee.

relationship. Their result turns really not upon any question of 'proximate cause,' 'assumption of risk' or 'contributory negligence,' but rather upon the employer's independent right to recover against the employee for the non-performance of a duty resulting in damage to the employer, which in effect offsets the employee's right to recover against the employer for failure to provide a safe place to work. Such cases are quite inapposite here. Dixon was not guilty of any breach of duty to his employer."

Here again Appellee attempts to equate an uncongenial rule with assumption of risk in order to eliminate the rule as it pertains to the Jones Act (negligence) aspect of the claim.<sup>9</sup> How it can be supposed that the elements of assumption of risk are identical with the elements of the breach of an employment contract is difficult to understand. It is equally difficult to understand how an Act depriving an employer of a defense to tort suits can be read as depriving him of the right to bring actions for breach of contract. The right to sue an employee, maritime or otherwise, for a breach of contract causing damages seems to be recognized as unimpaired to the present day. To deprive the employer of this right would reduce the employment contract to no contract at all—an arrangement in which an employer would be under an enforceable duty to pay wages but the employee under no enforceable duty whatever. Although it does not seem to have been grasped by a number of courts (and probably the counsel who appeared before them) the true

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<sup>9</sup>As Appellee's contentions are based upon interpretations of the Federal Employers Liability Act, 45 U.S.C. §51 et seq., as incorporated in the Jones Act, they have no application to the claim based upon the warranty of seaworthiness.

significance of the *Walker* rule is, as Judge Harlan points out, that it avoids circuitry of action by accomplishing an offset of damages without the necessity of separate claims.

Viewing this matter in perspective there seems to be no question but that Schneider, or anyone in his position, can be held accountable to his employer for the damages which his breach of duty causes with respect to the injury of a fellow employee. If another employee had been injured concurrently with Schneider and recovered damages from Hudson Waterways, Hudson in turn could recover the same damages from Schneider. It is difficult to rationalize a proposal under which the shipowner would have to pay Schneider, as well, and would be barred from recovering that portion of its damages which represented payment to Schneider himself rather than to his co-employee.

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### CONCLUSION

For the reasons set forth in our Opening Brief and above we submit that the Decree should be reversed with directions to enter a decree for Appellant.

Dated, San Francisco, California,  
March 10, 1966.

LILICK, GEARY, WHEAT, ADAMS & CHARLES,  
GRAYDON S. STARRING,  
ALF R. BRANDIN,  
*Attorneys for Appellant.*



FEB 14 1967

No. 20436

In the  
United States Court of Appeals  
*For the Ninth Circuit*

D. J. MILLER,

Appellant,

-vs-

COUNTY OF LOS ANGELES, a Political  
Subdivision of the State of Cali-  
fornia,

Appellee.

APPELLANT'S OPENING BRIEF

D. J. MILLER  
Post Office Box 728  
Boulder City, Nevada  
Propria persona





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Subdivision of the State of Cali-	)
fornia,	)
	)
Appellee.	)

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APPELLANT'S OPENING BRIEF

JURISDICTION

This Appellate Court has jurisdiction, 28 U.S.C., Sec. 1291. The District Court had jurisdiction, 28 U.S.C., 1331.

STATEMENT OF THE CASE

The concise, factually detailed, basic statement of the case and that which appellant adopts will be found



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No. 20436

In the  
United States Court of Appeals  
*For the Ninth Circuit*

---

D. J. MILLER,	)
Appellant,	)
-vs-	)
COUNTY OF LOS ANGELES, a Political	)
Subdivision of the State of Cali-	)
fornia,	)
Appellee.	)

---

APPELLANT'S OPENING BRIEF

JURISDICTION

This Appellate Court has jurisdiction, 28 U.S.C., Sec. 1291. The District Court had jurisdiction, 28 U.S.C., 1331.

STATEMENT OF THE CASE

The concise, factually detailed, basic statement of the case and that which appellant adopts will be found

in Decision, this case, at 341 F2d 964 (February 27, 1965), page 965:

"\* \* \* appellant claims to be the owner of 200 acres of specifically described real property located in the County of Los Angeles, State of California, title to and possession of which is in appellee as purchaser of the property at a surreptitious tax sale of property conducted by the tax collector of appellee. It is charged that the tax sale proceedings culminating with the acquisition of title by appellee were unlawful in that notices of such proceedings were not given to appellant although his name and mailing address were known to the officials of appellee who conducted such proceedings, and appeared in the pertinent tax books and records of appellee, and as a result of which unlawful tax proceedings appellant has been deprived of his property without due process of law. Appellant seeks to have it declared that title to said property is held by appellee in trust for him; that title to the property be vested in him on payment of all delinquent taxes and penalties accruing on said real property

to his first demand upon the appellee for the reconveyance of title to appellant, \* \* \*."

PROCEEDINGS IN THE DISTRICT COURT  
AFTER REMAND

After this case was remanded to the District Court the defendant moved for summary judgment with points and authorities, exhibits and affidavit, filed June 7, 1965. (Tr. 61) Plaintiff moved for judgment on the pleadings, filed June 22, 1965. (Tr. 82) Plaintiff subsequently served points and authorities with exhibits and affidavit in opposition to the defendant's motion for summary judgment, filed June 30, 1965. (Tr. 98) The Court granted defendant's motion for summary judgment, filed July 16, 1965. (Tr. 126) Plaintiff motioned for rehearing with points and authorities, filed July 21, 1965 (Tr. 128), which were supplemented and included affidavit and exhibits, filed August 3, 1965. (Tr. 141)

The Court below denied plaintiff's Motion for Rehearing, filed August 16, 1965. (Tr. 149) Notice of Appeal was filed September 3, 1965 (Tr. 150) Plaintiff below filed with the Court

of Appeals pursuant to Rule 13 of this Court "Points on Which Appellant Intends to Rely" on October 12, 1965 (Tr. 151)

#### SPECIFICATION OF ERROR

The Court below erred in granting summary judgment because there was a triable issue of fact for the following reasons:

(1) That the appellant herein was deprived of his property without due process of law in violation of the "Due Process Clause" of the Fourteenth Amendment.

(2) Appellant's contentions of a constructive trust in appellee and inadvertant constructive fraud, together or taken singly, overrule the "Statute of Limitations" relied on by appellee.

(3) There is such clear equity in appellant's favor that the doctrine of equitable estoppel should control.

(4) In opposition to the appellee's contention that the appellant's claim is barred by the Statute of Limitations, appellant relies upon his allegations that a fiduciary relationship existed



between the parties to these proceedings and appellee violated said fiduciary responsibilities by misrepresentation to appellant as to appellant's rights in premises by way of its information to appellant pertaining to redemption and sale of the property, and failure to mail notice.

(5) One who moves for Summary Judgment, such as the appellee here, has the burden of clearly demonstrating no genuine issue of fact. Any doubt as to the existence of such issue should be resolved against applicant.

(6) On an application for motion for summary judgment, pleadings are liberally construed in favor of the party opposing the motion and said party is given the benefit of all favorable inferences which might reasonably be drawn from the evidentiary matter of record before the Court. Here appellee owed a fiduciary relationship to appellant which appellant's affidavits and record below amply allege and show to have been breached and violated by appellee.

#### SUMMARY OF ARGUMENT

Appellant is entitled to have the property vested in him. Since his mailing address was known to appellee's

officials, its sale was consequently clearly unlawful because no notice was sent. Further still, subsequent misinformation from appellee's agents and officers totally frustrated appellant's intent and efforts to redeem and to determine when thereafter timely action should be filed. Hence, appellant should prevail on the theory either of constructive trust or the other doctrines urged, particularly equitable estoppel. The real property is worth many times the amount of the debt due appellee. Appellant was deprived of it without due process of law, in violation of his constitutional rights. No intervening improvements to the property, innocent third party rights or other bona fide collateral equities are involved or concerned. No statutes of limitation relied on by appellee are applicable to the particular facts of this action, and if any such did so pertain, appellee is estopped to assert them.

### ARGUMENT

#### I

#### THE MODERN VIEW IS TO LOOK AT THE STATUTE OF LIMITATIONS EQUITABLY

An excellent illustration of the many federal appellate cases pertaining to equity and the statute of

limitations is Ellgass v. Brotherhood of Railroad Trainmen Insurance Department, Inc., et al., 342 F2d 1, wherein this court said, on page 4:

"The equitable doctrine which we are applying is illustrated in the case of Tyra v. Board of Police and Fire Pension Commissioners, 32 Cal. 2d 666, 197 P.2d 710 \* \* \*."

Appellant's principal argument is that Ellgass and Tyra are wholly analogous to and controlling of this case. In the one there was insurance, in the other there was a pension wrongly denied --there was a misleading of the claimant by defendant in each, to claimant's detriment, and the statute of limitations was thereafter attempted to be used as a defense in each, after defendant's own conduct had caused and brought about the claimant's delay in filing action. Here the property (200 acres) represents a substantial part of appellant's life savings and was an investment to serve the same purpose as insurance or a pension.<sup>1/</sup> If there is any real distinction between the cases, equity more than balances it in appellant's

---

<sup>1/</sup> Appellant is not and does not expect to become eligible for any pensions or insurance providing his future support or maintenance.

favor since in Ellgass and Tyra there had to be a possibly unanticipated and unamortised disbursement from the appellee's respective insurance and pension accounts while here at bar appellee will receive the money actually due it but will lose nothing. And there was in this case even more -- appellant's reliance upon an even stronger, fiduciary relationship between appellant and appellee public office and officials.

In Burnett v. New York Central Railroad Co., 85 S.Ct. 1050 (1965) the Supreme Court substantially followed this Court's rulings in Ellgass. On page 1054 it held:

"Statutes of limitations are primarily designed to assure fairness to defendants."

Defendant will have all the fairness which it may claim, legal or equitable, if plaintiff prevails. It will receive its due payment. The Supreme Court further said on page 1055:

"This policy of repose, designed to protect defendants, is frequently out-weighted, however, where the interests of justice require vindication of the plaintiff's rights."

In the "Federal Reporter" advance reports of November 1, 1965, under "limitation of actions" the following is found:

"C.A.Pa. 1965. The modern view is to hold that the period of limitations is tolled because of plaintiff's innocence, even though defendant had no knowledge that a claim would be made against him. Northern Metal Co. v. U. S., 350 F.2d 833.

In the above case on page 37 the Court said:

"Many situations have arisen where courts of justice have been compelled to recognize the right to sue even though by the clock alone the time has run. So it early came to be recognized that the statute of limitations would not begin to run against an action for fraud until its discovery by plaintiff." Bailey v. Glover, 88 U.S. (21 Wall.) 342, 22 L.Ed. 636 (1874).

Then later, in Northern Metal Co., the Court cited the Supreme Court case, Burnett, supra, hence, there is a line of cases in 1965 with the "modern view" of equitable justice beginning with the

Ninth Circuit case, Ellgass, then followed by the Supreme Court, lastly by the Court of Appeals of the Third Circuit.

## II

THERE WAS MISINFORMATION FURNISHED  
APPELLANT WHICH PREVENTED HIM FROM  
ACTING TO REDEEM HIS PROPERTY OR  
FILE SUIT SOONER.

The time lag in filing suit was much longer in Ellgass, although appellee complains that plaintiff's action should have been filed sooner. Exhibit "C" (Tr. 114) to Plaintiff's Opposition to Defendant's Motion for Summary Judgment is a letter from appellee's officers describing the property by what is actually a legal description consisting of only 10 acres, although this same letter specifically states it to be 40 acra. In real fact appellant's letter of inquiry requesting information concerned and described a total 200 acres, the correct amount of his property involved.<sup>2/</sup>

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<sup>2/</sup> Appellant never alleged that appellee deliberately sent this erroneous letter to confuse appellant, only that it shows an inadvertant but continuing



Appellee has failed to allege or intimate how plaintiff could have filed any effective or even intelligible action if he could not find out from appellee the pertinent information regarding his property. In other words, plaintiff did not and could not otherwise know or learn what the status of his property in question actually was.

Nowhere in the record of this case has appellee clarified the foregoing frustrating misinformation which compounded the previous oral misinformation as shown by appellant's affidavit (Tr. 094 and 095). Hence, there was both oral and written misinformation which not only in effect prevented appellant's redemption of the property but which also prevented appellant's earlier information and decision that filing of suit would be necessary. Appellant has shown that he did not act and perform as he would otherwise have done had he known the facts, which were not disclosed to him because of the failure of appellee's officers to perform in the light of their duty and

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2/ [Cont'd] neglect of its duty and indifference to rights of appellant. In any event, it is documented evidence which substantiates verbal misinformation and indifference.



trust; it is submitted that those facts deserve the application of the doctrine of equitable estoppel.

Other exhibits to the same document are: "A", "A-1", "B" and "B-1". (Tr. 110, 111, 112, 113) These exhibits show that there was posted of record in appellee's official records a correct address previously used by appellee's officers in correspondence with appellant regarding this same land and address where if appellee had sent notice it would have been received and acted upon.

In Ellgass at page 4, the Court said:

"The defendant's letter contained statements and assumptions which were erroneous, fundamentally and dangerously erroneous."<sup>3/</sup>

Further on the same page, this Court stated:

"The plaintiff says that, in spite of this lapse of time, the period of limitation provided in his contract

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<sup>3/</sup> This is precisely the same as the portent of appellee's letter, Exhibit "C" (Tr. 114).

has not run against his claim because, in the circumstances, the defendant is estopped from relying on that provision. We agree with the plaintiff." (Emphasis added.)

And again, on the same page, the following language which has a clear relevancy to this case is found:

"These statements were inexcusably erroneous on the part of the union, and we see no equity in permitting the union to profit by its own wrong." (Emphasis added.)

### III

#### CURRENT HEADLINES IN THE NEWS MEDIA DISCLOSE WEAKNESS WITHIN COUNTY TAXING SYSTEMS WHICH ADVERSELY AFFECT THE PUBLIC INTEREST.

Recent disclosures of scandalous operations within the property tax system of various counties make a further distinction between this case and the Howard Case (so frequently cited by appellee.) As reported in the "Los Angeles Herald" of September 21, 1965:

"Assembly speaker Jesse M. Unruh today<sup>4/</sup> 'pitied' the property taxpayer as the last 'VESTIGE OF FEUDALISM' \* \* \*."

"'Under present law there is virtually no protection for the harassed taxpayer,' \* \* \* 'and no court will take his case. An appeal to county supervisors is usually fruitless, as the issue of equity gets confused \* \* \* with the need for revenues.'"

"Unruh claimed the property tax system lacks justice and fair play and is alien to our form of government."

Moreover, previously there was an article in the "Los Angeles Times" of September 13, 1965 which is as follows:

"ASSEMBLY COMMITTEE TO  
LOOK INTO TAX SCANDAL

"Lawmaker Says Inquiry Will Show  
Trail 'Of Collusion, Extortion,  
Bribery, Fraud'

"A state assemblyman declared Sunday that his committee will look into the state's tax assessment scandal and will develop testimony 'showing a fantastic trail of collusion, extortion, bribery and fraud.'"

---

4/ [From page 13] In speaking to the California Savings and Loan League.

"Assemblyman John T. Knox (D-Richmond), chairman of the Assembly Municipal and County Government committee, told the Times he has examined part of the court-impounded files \* \* \* and on this basis the scandal 'appears to be the greatest example of governmental corruption since \* \* \*.'"

The foregoing material while concerning principally alleged malfeasance rather than misfeasance has a relationship to the substance of the case at bar in that it shows elements erupting from the administrative magma which at the very least point to a condition of affairs existing in or as a result of the ramifications of property taxation which crystallize the considerations and application of equity so well illustrated and exemplified by the principle and holdings of the said Ellgass case. Surely the above quoted legislators have (by their very words) indicated that they never intended any so-called statute of limitations to be applied as an inadvertant tool to confiscate a citizen's property after inadvertant negligence and neglect of duty to that citizen.

IV

FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE IMPROPER.

Appellee's findings of fact and conclusions of law adopted by the Court were not proper on summary judgment.

On summary judgment it is improper for findings of fact and conclusions of law to be filed. Bohn Aluminum and Brass Corp. v. Storm King Corp., C.A. Ohio (1962) 303 F.2d 425; Hindes v. U.S., C.A.Tex. 1964, 326 F.2d 150, certiorari denied 84 S.Ct. 1168, 377 U.S. 908, 12 L.Ed. 2d 178.

Making of specific findings and separate conclusions is ill advised where no genuine material factual issue is presented to court, since this would carry an unwarranted implication that fact question had been presented. A R Inc. v. Electro-Voice, Inc., C.A.Ind. 1962, 311 F.2d 508.

V

APPELLANT'S FAILURE TO FILE PROPERTY STATEMENT WAS IRRELEVANT AND IMMATERIAL

The appellant is placing in the appendix another letter from appellee's neighboring counties with respect to the requirements or necessity of filing a property statement. This point has been covered in the proceedings below in Plaintiff's Supplemental Memorandum in Support of Motion for New Trial. (Tr. 138, 140, also at Tr. 100 in Opposition to Summary Judgment). No personal property, improvements or other matters calling for any property statement are alleged, involved or concerned in this action.

As shown by Exhibit "A" to Affidavit and Supplemental Memorandum on July 29, 1965, the assessor's office of Ventura County advised:

" . . . it is only necessary that personal property be declared by the taxpayer. Real property is automatically placed on our assessment roll." (Tr. 140)

Appellant has sworn in his Affidavit that the assessor's office in San Bernardino told him,

"The property statement is not required." (Tr. 138)

VI

SUMMARY JUDGMENT FOR APPELLEE  
WAS IMPROPER ON THE FACE OF THE  
RECORD.

Plaintiff cited below, numerous authorities regarding impropriety of summary judgment for appellee, defendant below. (Tr. 131, 132, 133)

The cases are legion that "in resolving defendant's motion for summary judgment facts must be assumed that are most favorable to plaintiff." McKnight v. N.M. Paterson & Sons, Limited, D. C. Ohio (1960) 181 F.Supp. 434, affirmed 286 F.2d 250, certiorari denied 82 S.Ct. 189, 368 U.S. 913, 7 L.Ed. 2d 130.

The affidavit filed with appellee's Motion for Summary Judgment stated legal conclusions which must be disregarded as held by this Court, and was not supported by any probative documents. (Tr. 100, line 14):

" . . . affidavit stating legal conclusions and papers . . . not attached to an affidavit must be disregarded." Washington v. Maricopa County (CCA 9), 143 F.(2d) 871.



VII

APPELLANT EXTENSIVELY CITED  
AUTHORITIES IN THE COURT BE-  
LOW ON DUE PROCESS, CONSTRUC-  
TIVE TRUST, CONSTRUCTIVE  
FRAUD, EQUITY, ESTOPPEL AND  
STATUTE OF LIMITATIONS.

These are in the transcript of  
Record as follows:

(a) DUE PROCESS UNDER THE FOUR-  
TEENTH AMENDMENT TO THE CONSTITUTION  
OF THE UNITED STATES.

U.S. v. Blaylock, 159 F. Supp.  
874, Tr. 088, line 4; Schroeder v.  
City of New York, 83 S.Ct. 279, Tr.  
091, line 13; Mullane v. Central Han-  
over Tr. Co., 339 U.S. 306, 314, 20  
S.Ct. 410, Tr. 091, line 24; Walker  
v. City of Hutchinson, 77 S.Ct., pg  
202, Tr. 134, line 28; Western Union  
Telegraph Co. v. Industrial Commis-  
sion of Minnesota, D.C. Minn. 1938,  
24 F.Supp. 370, Tr. 135, line 30.

(b) CONSTRUCTIVE TRUST.

49 Cal.Jur.2d at page 228, Tr.  
086, line 14; Doing v. Riley, 176 F.  
2d 449, Tr. 087, line 4; Judge Car-  
doza, Tr. 088, line 31; Texas Co. v.  
Miller, 165 F.2d 111 C.C.A. Tex. 1948,  
Tr. 090, line 7.

(c) CONSTRUCTIVE FRAUD

Neet v. Holmes (1945), 154 P.2d 854, 25 Cal.2d 447 Tr. 090, line 18; Section 1573 of the Civil Code of the State of California, Tr. 090, line 20; Epstein v. U.S., 174 F.2d at page 766, Tr. 090, line 28.

(d) EQUITY

U.S. v. Certain Parcels of Land, 131 F.Supp. 65 at p. 71 (D.C.Cal.), Tr. 084, line 9, 089, line 6; Deauville Corp. v. Garden Suburbs Golf & Country Club, 164 F.2d 430, C.C.A. Fla. 1948, Tr. 089, line 30.

(e) FIFTH AND EIGHTH AMENDMENTS  
TO THE CONSTITUTION OF THE UNITED STATES.

Gideon v. Wainwright, 372, U.S. 335, 83 S.Ct. 792, Tr. 143, line 28; Robinson v. California, 370 U.S. 660, 8 L.Ed. 2d 758, 82 S.Ct. 1417, Tr. 144, line 12.

(f) ESTOPPEL AND STATUTE OF LIMITATIONS

18 Cal.Jur.2d page 408, Tr. 087, line 9; Alma Inv. Co. v. Krausse, 117 Cal.App.2d 740 P. 744, 256 P.2d 1017 P. 1020, Tr. 087, line 22; People v. Gustafsoon, 53 Cal.App.2d 230, 127 P.2d

627, Tr. 088, line 26; Tyra v. Board of Police & Fire Pension Comm., 32 Cal.2d 666, 197 P.2d 710, Tr. 144, line 30, 145; Myers v. Hurley Motor Co., 1927, 273 U. S. 18, 24, 47 S.Ct. 277, 71 L.Ed. 516, Tr. 089, line 21.

### CONCLUSION

Appellant submits on the basis of the record it would be a miscarriage of justice to refuse to him the right to retain his real property upon the payment of the taxes justly due appellee, particularly when no third party rights or equities have intervened or can be affected.

Respectfully submitted,

D. J. MILLER  
Propria persona

---

### CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

---

Attorney



APPENDIX

Mr. D. J. Miller  
Box 728  
Boulder City, Nevada 89005

Dear Mr. Miller:

In reply to your inquiry of July 21, 1965, generally speaking, if any personal property is involved, such as household furnishings, inventory and equipment, which must be declared, a Property Statement is required.

On the other hand, if only a building or land is involved, no Property Statement is usually made.

Very truly yours,

/s/ H. W. HOLMQUIST  
County Assessor

HWH:LC

C O P Y



FEB 14 1967

No. 20436

In the  
United States Court of Appeal  
For the Ninth Circuit

D. J. MILLER,

*Appellant,*

VS.

COUNTY OF LOS ANGELES, a political subdivision of the State of California,

*Appellee.*

Appellee's Brief

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

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WESTERN PRINTING COMPANY, SMITHIER—OXBOW 8-1722

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WILLIAM F. WILSON, Clerk





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**In the**  
**United States Court of Appeal**  
**For the Ninth Circuit**

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D. J. MILLER,

*Appellant,*

vs.

COUNTY OF LOS ANGELES, a political subdivision of the State of California,

*Appellee.*

No. 20436

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**Appellee's Brief**

---

**STATEMENT OF THE CASE**

On December 31, 1963, appellant filed his Complaint in the Court below designated "Complaint for Declaratory Relief and to Impress Constructive Trust on Real Property for Damages and for Unjust Enrichment" (Cl. Tr. 2-9) and on January 27, 1964, appellant filed his First Amended Complaint (Cl. Tr. 12-20). Although denominated a Complaint for Declaratory Relief and praying for a declaration that he is the owner of certain real property therein described, appellant alleges that appellee acquired record title to said real property through allegedly surreptitious tax sale proceedings and further, that the real property had

been deeded to the State of California on July 1, 1959, and deeded to appellee on October 9, 1960 (Cl. Tr. 15). It is, therefore, apparent that, in effect, appellant is attacking the validity of the deeds to the State of California and the deed to appellee County of Los Angeles.

On February 4, 1964, appellee filed a Notice of Motion and Motion to Dismiss (Cl. Tr. 21), which motion was granted by the Court below on April 20, 1964 (Cl. Tr. 49). Thereafter, appellant appealed and this Court reversed the Judgment of Dismissal on the sole ground that the Court below had jurisdiction under 28 USC Section 1331 and that the District Court erred in dismissing the cause on the theory that said District Court lacked any jurisdiction (*Miller v. County of Los Angeles*, No. 19424, February 27, 1965, 341 Fed 2d 964).

On remand, appellee moved for summary judgment (Cl. Tr. 61) on the grounds that appellant's cause of action is barred by the provisions of sections 175, 3521 and 3809 of the Revenue and Taxation Code of the State of California. In support of said motion, appellee filed an affidavit by Leland E. Skinner, head clerk of the Tax Deeded Lands Section of the Office of the Tax Collector of Los Angeles County, who averred *inter alia* that the taxes levied against the property subject of this action became delinquent in 1953; that the property was sold to the State of California by oper-



ation of law pursuant to Section 3436 of the Revenue and Taxation Code on June 30, 1954; that on July 1, 1959, the said property was deeded to the State of California pursuant to Section 3511 of the Revenue and Taxation Code and that on October 19, 1960, the property was deeded to appellee County of Los Angeles (Cl. Tr. 70-72). Attached to said affidavit as Exhibits A, B and C were certified copies of the deeds from the Tax Collector to the State and the deed to appellee County (Cl. Tr. 73-75).

Affiant Skinner further averred that prior to the sale to the State by operation of law and prior to the deeding of the property to the State and prior to the deeding of the property to appellee, examination was made of the tax rolls beginning with the year of delinquency to and including the last equalized roll to ascertain the address of the last assessee and that no address appeared on said roll (Cl. Tr. 72). Affiant also averred that notice of the sale and deeding of the property was published as is required by the Revenue and Taxation Code.

Also, affiant Skinner averred that he had examined the records in the Assessor's Office of Los Angeles County and that said examination disclosed that no property statement as is required by Sections 441 through 447 of the Revenue and Taxation Code was filed by appellant between 1952 and 1960 and as a consequence, no address for appellant appeared on the tax rolls for said years (Cl. Tr. 72).

In opposition to appellee's Motion for Summary Judgment, appellant filed points and authorities and an affidavit *which in no way controverted the facts set forth in the affidavit of affiant Skinner* (Cl. Tr. 94-114). Appellant's affidavit, at most, alleged that appellant commenced a redemption payment plan in 1951 wherein the first payment (and it would appear the only payment) was made on November 13, 1951 (see Exhibits A and A1, Cl. Tr. 110-111); that receipt for the first payment was mailed to appellant in December, 1951 (Exhibit B, Cl. Tr. 112); that other mail from an unknown person had been forwarded to appellant (Exhibit B1, Cl. Tr. 113) and that on January 10, 1962, in response to a letter from appellant apparently dated December 16, 1961, he was advised by the Tax Collector that the property had been deeded to appellee on October 19, 1960 (Exhibit C, Cl. Tr. 114)

On July 12, 1965, the lower court granted appellee's Motion for Summary Judgment (Cl. Tr. 124) and Findings of Fact and Conclusions of Law and Judgment in favor of appellee County of Los Angeles were filed and entered on July 12, 1965, and July 13, 1965 (Cl. Tr. 116-121). Appellant's Motion for New Trial or Rehearing was denied August 16, 1965 (Cl. Tr. 149) and on September 3, 1965, appellant filed his Notice of Appeal (Cl. Tr. 150).

## ISSUE ON APPEAL

The sole issue on appeal is whether appellant's cause of action is barred by Sections 175, 3521 and 3809 of the Revenue and Taxation Code of the State of California.

## SUMMARY OF ARGUMENT

Sections 175, 3521 and 3809 of the Revenue and Taxation Code provide a one-year statute of limitations within which to attack the validity of tax deeds issued to the State of California or to a political subdivision thereof as a means of enforcing *ad valorem* property tax delinquencies. The deeds here in issue were executed on July 1, 1959 (State), and October 19, 1960 (County). Appellant did not file the present action until December 31, 1963, some four years and five months subsequent to the deeding of the property to the State of California and three years and two months subsequent to the deeding of the property to appellee County and, therefore, his cause of action is barred by the aforementioned sections.

Appellant cannot claim as error a lack of notice by mail since this error, if in fact it be one, was caused solely by the neglect of appellant. Appellant failed and neglected to file with the Assessor of Los Angeles County a property statement as is required by Sections 441 through 447 of the Revenue and Taxation Code and as a result, no address appeared on the tax rolls. Since

no address appeared on the rolls, no notice by mail could be sent appellant. Appellant seeks to hold appellee liable for a problem created solely by appellant's neglect.

# I.

## SUMMARY JUDGMENT WAS PROPER IN THE INSTANT ACTION

The purpose of summary judgment is to achieve a quick resolution of a dispute when there is no necessity for a trial on the facts. As was stated in *Albatross Shipping Corp. v. Stewart* (CA 5 1964) 326 Fed 2d 208, at 211:

“... The prime purpose of the summary judgment procedure is to secure the just, speedy and inexpensive determination of any action ...”

FRCP 56(c) provides in pertinent part:

“... the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law ...”

Appellee submits no question of fact is presented by the instant action and, therefore, the granting of the motion for summary judgment was proper. Ap-

pellant in no way controverted the affidavit of Mr. Skinner, which was filed in support of appellee's motion. Appellant did not deny that his property was tax delinquent; he did not deny that the deeds were executed on the dates mentioned; and he did not deny that he had failed to file the property statements required by law. Appellee respectfully submits that since no question of fact was presented to the Court below, the said Court was justified in ruling as a matter of law that appellant's cause of action is barred by Sections 175, 3521 and 3809 of the Revenue and Taxation Code of the State of California.

## II.

### **CALIFORNIA STATUTORY MODE FOR THE ENFORCEMENT OF DELINQUENT TAX LIENS.**

Although perhaps redundant, appellee feels that a brief resumé of the applicable California law respecting tax delinquencies is appropriate to set the proper frame of reference herein.

California provides a complete and exhaustive statutory mode for the enforcement of and the collection of delinquent ad valorem property taxes. Every tax on real property is a lien against the real property assessed (Revenue and Taxation Code Sec. 2187)\* which attaches annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied (Sec. 2192). The first half of the taxes are due November 1 and become delinquent December 10 (Secs. 2605 and 2617), and the second half of the taxes levied are due February 1 and become delinquent April 10 (Secs. 2606 and 2618). After the second half of taxes on real property is delinquent, the Tax Collector is required to prepare a delinquent roll (Sec. 2624) and thereafter publish same (Sec. 3351), together with a notice that unless the total amount due is paid, the time and place at which the property will be sold to the State by operation of law (Sec. 3352). Not less than 21 nor more than 28 days after the publication of

---

\*All references hereafter are to the Revenue and Taxation Code unless otherwise stated.

the delinquent list, the real property on which the taxes have not been paid is sold by operation of law to the State of California (Sec. 3436).

Five years after the property is sold to the State, the Tax Collector is required to execute a deed conveying the property to the State (Sec. 3511). Prior to such deeding, the Tax Collector is required to publish notice thereof (Secs. 3354 and 3355) and to forward a notice thereof by registered mail to the last known assessee. To ascertain the address, the Tax Collector is required to examine the assessment of the property on the rolls beginning with the year of delinquency to and including the last equalized roll (Sec. 3358).

Every person is required to file a written property statement under oath with the Assessor between noon on the first Monday in March and 5:00 p.m. on the last Monday in May annually (Sec. 441), setting forth all taxable property owned, claimed, possessed, controlled or managed by that person (Sec. 442). The property statement required by the Assessor shows the person's name, place of residence or place of business, and whether he is the owner of any taxable property (Sec. 543).

Subsequent to the deed to the State, the real property is either sold at public auction (Secs. 3691 - 3731) or by agreement conveyed to a county, city or other public agency (Secs. 3771 - 3814). The latter procedure was followed in the instant action.



Whenever land has been deeded to the State, a county may purchase the property by agreement (Secs. 3791.3 and 3775). The County Tax Collector is required to give notice of this agreement by publication and is required to mail a notice thereof by registered mail to the last known assessee (Secs. 3798 and 3799). To ascertain the address of the last known assessee, the Collector is required to examine the rolls beginning with the year of delinquency to and including the last equalized roll (Sec. 3799). Thereafter, the Tax Collector executes a deed of the property to the County which, except as against actual fraud, is conclusive evidence of compliance with requirements of the Code (Secs. 3804 and 3806).

The Revenue and Taxation Code further provides a one-year statute of limitations within which to attack the validity of the deed to the State (Secs. 175 and 3521), as well as a similar period to attack the validity of the deed from the State to the County (Secs. 175 and 3809).

**III.**

**APPELLANT'S CAUSE OF ACTION IS BARRED BY SECTIONS 175, 3521 AND 3909 OF THE REVENUE AND TAXATION CODE OF THE STATE OF CALIFORNIA.**

**A. Sections 175, 3521 and 3809 Are Statutes of Limitation.**

Section 175 of the Revenue and Taxation Code of the State of California provides:

“Sec. 175. All deeds heretofore and hereafter issued to the State of California or to any taxing agency, including taxing agencies which have their own system for the levying and collection of taxes, by reason of delinquency of property taxes or assessments levied by any taxing agency or revenue district, shall be conclusively presumed to be valid unless held to be invalid in an appropriate proceeding in a court of competent jurisdiction to determine the validity of said deed commenced within one year after the execution of said deed, or within one year after the effective date of this section, whichever be later. Such proceedings may be prosecuted within the time limits above specified in the manner and subject to the provisions of Sections 3618 to 3636 of this code.”

Section 3521 provides:

“Sec. 3521. A proceeding based on an alleged invalidity or irregularity of any deed to the State for taxes or of any proceedings leading up to the

deed can only be commenced within one year after the date of recording of the deed to the State in the county recorder's office or within one year after June 1, 1941, whichever is later.

“Sections 351 to 358, inclusive, of the Code of Civil Procedure do not apply to the time within which a proceeding may be brought under the provisions of this section.”

Section 3809 provides:

“Sec. 3809. A proceeding based on alleged invalidity or irregularity of any agreement or deed executed under this article can only be commenced within one year after the execution of the instrument.”

In construing Section 175 the Supreme Court of this state in *McCaslin v. Hamblen*, 37 Cal. 2d 196; 231 Pac. 2d 1, stated at page 198:

“It may not be questioned that the section is a Statute of Limitations as distinguished from a curative act, and that the time factor is reasonable so as to bar these actions commenced almost two years after the effective date (citing cases), unless it may be said that the plaintiffs were owners in possession as against whom the statute would not apply.”

*In Sears v. County of Calaveras*, 45 Cal. 2d 518; 289 Pac. 2d 336, the plaintiff brought an action in 1948 to declare invalid a tax deed issued in 1943. Defendants

demurred on the ground that plaintiff's action was barred by the limitations contained in Sections 175 and 3521 of the Revenue and Taxation Code. Plaintiff contended that those sections do not apply to an owner in exclusive and undisputed possession. In rejecting this argument the Court stated at page 521:

“The contention that a statute limiting the time for the commencement of an action to set aside a deed to the state for delinquent taxes does not apply to an owner in exclusive and undisputed possession of the property taxes, is largely based on a rule stated to be that a general statute of limitations does not run against such an owner to remove a cloud upon his title. It may be assumed that such is the general rule (citing cases).

“But the general rule does not apply as against a special statute of limitation foreclosing the commencement of an action to set aside a deed to the state for delinquent taxes beyond one year from and after the recording of the deed to the state.”

The Court further stated at page 520:

“Both of these sections are statutes of limitation (citing cases).”

In *Davault v. Essig*, 80 Cal. App. 2d 970; 183 Pac. 2d 38; Cert. denied 68 Supreme Court 660; 333 U.S. 843; 92 L. Ed. 112 the Court stated at pages 972 and 973:

“The appellants argue that Section 3521 does not apply in such a case as this where the attack is made on jurisdictional or constitutional grounds raising the point that original proceedings which led to the sale to the State were entirely invalid. This contention is without merit since Section 3521 is not a curative act but is a Statute of Limitation and repose, providing a reasonable period of limitation (citing cases). The principles applied in *Mercury-Herald Co. v. Moore*, 22 Cal. 2d 269 (138 Pac. 2d 673; 147 A.L.R. 1111) are applicable here. If the shortening of the period of redemption, where a reasonable time is allowed in which to act, is not violative of constitutional rights it would seem to be even more clear under principles which are frequently applied that a right exists to fix some reasonable limitation upon the time within which a constitutional right may be exercised, by which a limitation is placed on the time within which an action may be commenced to attack the validity of a deed to the State, which deed is given after the five-year period of absolute right of redemption has expired.”

In *Federated Income Properties, Inc., v. State of California*, 82 Cal. App. 2d 893; 187 Pac. 2d 460, property had been sold to the State of California for non-payment of taxes. After acquiring title, the State sold the property to the City of South Pasadena pursuant to an agreement authorized by Chapter 8 of Part 6 of Division 1 of the Revenue and Taxation Code (Sec-

tions 3791 et seq.). Plaintiff two years later brought an action to quiet title to the property and the City of South Pasadena, among other defenses, claimed that the action was barred by Section 3809 of the Revenue and Taxation Code. In affirming the judgment for the defendant, the Court stated at page 901:

“3. *The Statute of Limitations.* Since the sale to the City of South Pasadena was valid and since this action was not commenced within one year after the execution of the deed from the State to the City, it is barred by Section 3809 of the Revenue and Taxation Code.”

Other cases holding Sections 175, 3521, and 3809 to be Statutes of Limitation are: *People v. Chambers*, 37 Cal. 2d 552; 233 Pac. 557; *Edwards v. City of Santa Paula*, 138 Cal. App. 2d 375; 292 Pac. 2d 31; and *Tannhauser v. Adams*, 31 Cal. 2d 169; 187 Pac. 2d 176.

Statutes and code sections should be given a reasonable interpretation according to the apparent or evident intention of the legislature (*Dickey v. Raisin Proration Zone*, 24 Cal. 2d 796; 151 Pac. 2d 505; *Alameda Co. v. Kuchel*, 32 Cal. 2d 193; 195 Pac. 2d 17) and it seems quite apparent from a study of Revenue and Taxation Code that the legislature intended some finality to tax deeds and the proceedings leading up thereto (see Sections 175, 176, 177, 3521, 3522, 3711, 3809 and 3810). As was stated in *Sears v. Calaveras*, *supra*, 45 Cal. 2d 518 at page 521, “If the contention



of the plaintiffs should prevail, the finality of tax proceedings will be thrown into confusion. The validity of tax deeds as against an owner of real property would be placed in suspension for an indefinite period and until at his election he chose to attack it. Without limit of time he could defend against it."

*In Howard v. State of California* (1963), 216 Cal. App. 2d 281; 30 Cal. Rptr. 708 (Hearing denied by California Supreme Court), a case identical with the one at bar, plaintiffs brought an action to quiet title to certain real property which had been deeded to the County pursuant to Revenue and Taxation Code Sections 3791 et seq. Plaintiffs contended therein that failure to send notices by registered mail voided the tax proceedings and subsequent tax deeds. The Court rejected this argument stating at page 285:

"If timely objection had been made to any purported irregularity in the tax proceeding leading to the county's eventual tax title the court might have entertained such objection, but continued dereliction by plaintiffs has inexplorably foreclosed them from relief. There must be a finality to tax enforcement procedures. There is in tax cases, the unquestioned tax debt to justify the taking and in addition, the taxpayer is permitted at least six years within which to redeem or attack any supposed irregularity in the tax proceedings. Such period is a most reasonable allowance for the cure of the laxity of tax delinquency."



**B. Appellant's Action was not Timely Filed.**

1. Appellant is barred from contesting the validity of the deeds from the Tax Collector to the State.

The affidavit of Leland E. Skinner filed in conjunction with appellee's Motion for Summary Judgment set forth the following facts with respect to the real property here involved:

- |                          |                    |
|--------------------------|--------------------|
| 1. Taxes Levied for Year | 1953               |
| 2. Taxes Paid            | No                 |
| 3. Sold to the State     | June 30, 1954      |
| 4. Deeds to State        | July 1, 1959       |
| 5. Deeds Recorded        | July 30, 1959      |
| 6. Deed to County        | October 19, 1960   |
| 7. Deed Recorded         | November 21, 1960. |

Appellant had up and until August 1, 1960, to contest the validity of the deeds to the State or the proceedings leading up to said deeds (Sec. 3521).<sup>\*</sup> Appellant did not file his action until December 31, 1963, some three years and five months *after* the expiration of the statutory period and, therefore, any action contesting the validity of said deeds is barred.

2. Appellant is barred from contesting the validity to appellee County.

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<sup>\*</sup>Section 175 provides a one-year statute of limitations from the date of *execution* of the deed, while Section 3521 provides a one-year statute of limitations from the date of *recording* said deed.

Appellant had until October 20, 1961, to contest the validity of appellee's deed. Appellant did not file his action until more than two years and one month after the expiration of this period and, therefore, his action with respect to this deed is also barred.

#### IV.

#### **APPELLEE IS NOT ESTOPPED FROM ASSERTING THE BAR OF THE STATUTE OF LIMITATIONS.**

Appellant cites *Ellgass v. Brotherhood of Trainmen* (CA 9 1965), 342 Fed. 2d 1, and *Tyra v. Board of Police Commissioners*, 32 Cal. 2d 666; 197 Pac. 2d 710, for the proposition that the "Modern view is to look at the statute of limitations equitably" (AOB 6-10). These cases can be of no help to appellant. Both *Ellgass* and *Tyra* involved contractual obligations between the parties wherein the defendants had *affirmatively* misrepresented to plaintiff that his rights under certain pension programs had expired. In reliance upon these representations, plaintiffs failed to bring their actions within the statutory period. This court and the California Supreme Court applied the well-known doctrine of equitable estoppel and held that defendants were estopped from relying on the statute of limitations because of their affirmative conduct.

No such circumstances exist in the instant case since appellee took no affirmative action upon which appellant relied to his detriment. Apparently, it is appel-

lant's position that a letter written January 10, 1962 (Exhibit C Cl. Tr. 114) in response to an inquiry by appellant dated December 19, 1961, affirmatively misrepresented the facts to him and caused him to delay filing his action. Appellee would point out that the only misinformation contained in that letter is the legal description contained therein. It should also be noted that at the time of appellant's inquiry on December 19, 1961, the statutory period within which he could contest the validity of the deed to appellee had already expired. Inconceivably, appellant now argues that information given him after the statutory period had expired misled him.

The only other averments upon which appellant apparently relies are those found in the affidavit filed by appellant in support of his Motion for Judgment on the Pleadings (Cl. Tr. 94 and 95) wherein appellant states that he was "aware that defendant held a public auction of such tax delinquent property *only* in the first few months of each year at which time in the years 1960 and 1961 affiant telephoned the officers of defendant and was informed that said real property was not to be sold in said sales and was assured that he could redeem the property prior to any such sale at public auction."

FRCP 56 (e) provides in pertinent part:

"... When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response

by affidavit or as otherwise provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial.* If he does not so respond, summary judgment, if appropriate, shall be entered against him.” (Emphasis added)

Concededly, the affidavit of the party opposing summary judgment is to be liberally construed (*Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473; 7 L. Ed. 2d 458; 82 Sup. Ct. 486) and yet, even under the most liberal construction, appellant’s affidavit fails to set forth facts showing a genuine issue for trial. At most, appellant’s affidavit shows that in 1960 and 1961, someone informed him that his property was not among those listed for sale at public auction pursuant to Sections 3691 through 3731 and that should it be put up for sale, appellant had the legal right to redeem the property prior to such sale. These statements were obviously true for the property was not sold at public auction and Sections 3696.5 and 3706 provide a right of redemption prior to the sale.

The doctrine of estoppel is not favored in the law particularly where it is sought to be asserted against a public agency. Four things must be presented in order to invoke the doctrine of estoppel: (1) the party to be estopped must know all the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be

ignorant of the facts and (4) he must rely on the former's conduct to his injury (*Skidmore v. County of Solano*, 154 Cal. App. 2d 449, 453).

None of the latter three elements referred to above are presented in the instant action unless it can be said that reliance upon a correct statement of the law will give rise to an estoppel. Even appellant apparently concedes there was no intent to mislead (see FN 2 AOB 10-11, wherein appellant states "Appellant never alleged that appellee deliberately sent this erroneous letter to confuse appellant, only that it shows an inadvertent, but continuing, neglect of its duty and indifference to rights of appellant") and in view of the presumption that all people know the law (*Keystone Drilling Co. v. Superior Court*, 130 Cal. 738, 745, 726, 398; *Carroll Estate*, 138 Cal. App. 2d 363, 365; 291 Pac. 2d 976), he must be charged with knowledge that at any time after the deeding to the State, the property was subject to conveyance to appellee pursuant to Sections 3771 - 3814 of the Revenue and Taxation Code.

Furthermore, appellee submits that public policy requires the application of the statute of limitation in the instant action. Should this Court hold that mere averments that the taxpayer telephoned some unnamed officers of the County who advised the taxpayer that his property was not to be sold in certain years and could be redeemed by him prior to sale, are sufficient to place in issue the validity of tax deeds in an action filed more than three years after their execution, the

validity of all tax deeds heretofore issued would be jeopardized. This result is exactly that which concerned the California Supreme Court in *Sears v. Calaveras*, *supra*, 45 Cal. 2d 518. There must be some finality to tax enforcement procedures and appellee submits the six-year period within which the taxpayer may redeem or attack the proceedings is a more than reasonable time within which to cure tax delinquencies.

Appellant was advised on January 10, 1962, that his property had been deeded to appellee on October 19, 1960, and did not file the present action until almost two years after acquiring this knowledge. Assuming solely for the purpose of argument that appellee should be estopped from asserting the statute of limitations because appellant was misled to his detriment, he was not so misled subsequent to January 10, 1962, and any misrepresentations, if any there were, were cured as of that date. If appellee should be estopped, it should only be so for a period not to exceed one year subsequent to the time appellant was advised of the disposition of his property; i.e., up and until January 10, 1963. This one-year period would give appellant the same period of time allowed him by Section 3809 to attack the validity of the deed to appellee and yet, appellant slept on his rights until December 31, 1963, almost two years after he was advised by the Tax Collector that his property had been deeded to appellee.



V.

**APPELLANT'S FAILURE TO FILE A PROPERTY  
STATEMENT EXCUSED THE TAX COLLECTOR  
FROM SENDING HIM NOTICE.**

Section 441 of the Revenue and Taxation Code provides:

“Sec. 451. Every person shall file a written property statement, under oath, with the assessor between noon on the first Monday in March and 5 p.m. on the last Monday in May, annually, and within such time as the assessor may appoint. At any time, as required by the assessor for assessment purposes, every person shall furnish information or records for examination.”

Section 442 provides in part:

“Sec. 442 .The property statement shall show all taxable property owned, claimed, possessed, controlled, or managed by:

(a) The person making the statement. . . .”

It is from this property statement that the local tax rolls are prepared and unless such a statement is filed, no address will appear on said rolls. Without such address, no notice of the sale or deeding of property for tax delinquency can be sent by mail to the last assessee. In the instant action, at no time pertinent to inquiry did appellant ever file the required property statement with the Assessor of Los Angeles County and, therefore, no address appears on the tax rolls regarding the last assessee of the property.



Revenue and Taxation Code §3358 provides:

“After the first publication of the notice of the deed to the State of tax-sold property and not less than 21 nor more than 35 days before the date of deeding, when tax-sold property is to be deeded, the tax collector shall send by registered mail to the last assessee of the tax-sold property at his last known address either a copy of the publication or a printed notice of deeding the property to the State. *To ascertain the address of the last assessee of the tax-sold property an examination shall be made of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll.*” (Emphasis added.)

Revenue and Taxation Code §3799 provides:

“The tax collector shall mail a copy of the notice not less than 21 nor more than 28 days prior to the effective date of the agreement, by registered mail to the last assessee of each portion of the property at his last known address.

*“To ascertain the address of the last assessee of the tax-deeded property an examination shall be made of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll.*

“It is not necessary to mail a copy of the notice to any party who files with the tax collector a

written acknowledgment of receipt of a copy of the notice or a waiver of the notice.”

(Emphasis added.)

These code sections were fully complied with by the Tax Collector of Los Angeles County. Because appellant did not file a required property statement, no address appeared on the tax rolls and the Tax Collector was unable to send the notice required by mail.

With respect to the notice required by the code, the California Supreme Court has stated:

“The inquiry of the tax collector in endeavoring to ascertain the post office address of the delinquent property owners need not extend beyond an examination of the assessment roll during the period mentioned. All the tax collector has to do as to mailing notice is to look at the assessment rolls and ascertain to whom the property about to be sold was last assessed, and whether the address of the party appears thereon. If it does, he must mail a notice. If it does not, no mailing of notice is required. He is not bound to look beyond or outside the assessment roll to ascertain the address of a party when the assessment roll does not furnish it . . .” (*Jacoby v. Wolff*, 198 Cal. 667 at 681; 247 Pac. 195)

See also *Scott v. Beck*, 204 Cal. 78; 266 Pac. 951, and *Penuat v. Terwilliger*, 23 Cal. 2d 865; 147 Pac. 2d 552 wherein tax sale proceedings were held valid though no notice was sent to the last assessee. In each

case, the name of the assessee appeared on the rolls, but no address appeared thereon and the court held the tax collector was excused from complying with the sections requiring notice by mail.

The Skinner affidavit filed in support of appellee's Motion for Summary Judgment (Cl. Tr. 70-72) affirmatively shows that prior to any of the actions taken herein, examination was made of the tax rolls commencing with the year of delinquency (1953) to and including the last equalized roll and no address appeared thereon. These facts were not controverted by appellant.

The Tax Collector did all that was required of him under the law. But for appellant's failure to file a property statement, an address would have appeared on the assessment roll and notice of the Tax Collector's actions could have been sent him. Appellee submits appellant cannot now base his claim to the property on a problem created by his own neglect and failure to comply with the law.

## VI.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW DO NOT CONSTITUTE ERROR IN THE SUMMARY JUDGMENT PROCEDURE.

Appellant argues that adoption by the Court of Findings of Fact and Conclusions of Law was improper. (AOB 16). Concededly, Rule 56(a) of the FRCP, 28 USCA makes this practice unnecessary; however, appellant apparently overlooks local Rule 3(d)(2) of the US District Court for the Southern District of California which expressly requires this procedure. Local Rule 3(d)(2) provides in pertinent part:

“There shall be served with each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure proposed findings of fact and conclusions of law and proposed summary judgment.”

This procedure has been tacitly approved in *Trowler v. Phillips* (CA 9 1958), 260 Fed. 2d 924, wherein the court stated at page 926:

“... We have seen findings of fact accompanying summary judgments, Rule 56(a) of the FRCP, 28 USCA, which, while unnecessary, did provide a handy summary . . .”

The Findings of Fact and Conclusions of Law herein do just as was indicated in the *Trowler* case, *supra*; i.e., they provide a handy summary of the facts upon which the summary judgment was based.

## CONCLUSION

It is respectfully requested that this Honorable Court affirm the summary judgment of the Court below. Appellant's cause of action, if any he had, has long since been barred by the statute of limitations and his failure to file a property statement excused the Tax Collector from sending him notice by mail of the sale and deeding of his property for tax delinquency.

Respectfully submitted,

HAROLD W. KENNEDY  
County Counsel

and

IRVIN TAPLIN, JR.  
Deputy County Counsel

*Attorneys for Appellee*

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and in my opinion, the foregoing brief is in full compliance with those rules.

---

IRVIN TAPLIN, JR.  
*Attorney for Appellee*

FEB 14 1967

No. 20436

In the  
United States Court of Appeal  
For the Ninth Circuit

D. J. MILLER,

*Appellant,*

vs.

COUNTY OF LOS ANGELES, a political  
subdivision of the State of California,

*Appellee.*

Appellant's Reply Brief

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

D. J. MILLER,

Post Office Box 728

Boulder City, Nevada

*Propria persona.*

WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1722

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In the  
United States Court of Appeal  
For the Ninth Circuit

<hr/> <div style="display: flex; justify-content: space-between;"><div>D. J. MILLER,</div><div><i>Appellant,</i></div></div> <div style="text-align: center; margin: 10px 0;">vs.</div> <div>COUNTY OF LOS ANGELES, a political subdivision of the State of California,</div>	}	No. 20436
		<i>Appellee.</i>

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**Appellant's Reply Brief**

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The closing argument will briefly point out the respects in which appellee has failed to meet the issues discussed in the opening brief.

**I.**

**APPELLEE DOES NOT MEET THE CONSTITUTIONAL DUE PROCESS QUESTION.**

Appellee does not meet the "*constitutional question*" although it admits in its Statement of the Case that the "case" comes under 28 U.S.C. Sec. 1331. Nowhere is there a word in appellee's brief on this question and the attendant doctrines of constructive fraud,

constructive trust, equity, although appellee does make an ineffectual rejoinder regarding estoppel; but, which ingenuously at the same time proves appellant's case.

Appellee has simply refused to equate the color of law, which it cites as a basis to deprive appellant of his property, with the numerous authorities and propositions which appellant has cited and argued, showing with full substance that appellee did take the property without due process of law in violation of the 14th Amendment to the Constitution of the United States. He has not said a word about the other California statute of limitations which would be applicable where there is constructive fraud.

Appellee's brief contains a table of authorities listing 15 cases, yet only two of these are federal ones, *Albatross Shipping Corp. v. Stewart*, (C.A. 5 1964) 326 Fed. 2d 208, at 211, and *Trowler v. Phillips* (C.A. 9 1958), 260 F. 2d 924, which appellee quotes out of context on page 27. Immediately following appellee's "quotation," therein, is a much more appropriate quotation and ruling of *this Court* as follows:

"But all too often a set of unnecessary findings of fact is a telltale flag that points the way to a discovery that summary judgment should not have been granted."

## II.

### APPELLEE'S STATEMENT OF THE CASE IS MIS- LEADING AND, BY ITS OWN INTREPRETATION OF ESTOPPEL, APPELLANT SHOULD PREVAIL.

To begin with, "the statement of case" on page 4 of the respondent's brief is misleading as hereby quoted:

"Appellant's affidavit, at most, alleged that appellant commenced a redemption payment plan in 1951 wherein the first payment (and it would appear the *only payment*) was made on November 13, 1951 (see *Exhibits A and A1*, Cl. Tr. 110-111); . . ." (Emphasis supplied.)

The above shows it concerned taxes prior to 1951, yet on page 17 appellee lists the present taxes delinquent as beginning with 1953. Actually, appellant had properly paid his taxes with respect to prior delinquency with *full* redemption payments, and would have done so in the instant delinquency if he had been given a chance. Because of financial limitations appellant had allowed the taxes to be a lien and willingly suffered the penalties and redeemed after they had accumulated for a number of years.\*

Again, on page 4 appellee states:

"... that receipt for the first payment was mailed to appellant in December 1951 (*Exhibit B*, Cl. Tr. 112); . . ."

---

\*The record shows without rebuttal that other property owners redeemed such property delinquent a longer period than the instant property. (Tr. 095 Plaintiff's Affidavit, Par. 8.)

The purpose of the foregoing “exhibit” was to show the Court that appellant’s address was inscribed in appellee’s redemption department records.

Thus, continuing with a quotation from appellee’s statement of the case:

“... that other mail from an unknown person had been forwarded to appellant (*Exhibit B1*, Cl. Tr. 113) ...”

The purpose of the above “exhibit” was to show that the *same address* held by said redemption department was a *valid one* and was so in the essence of time involved in the processing of the said property *through* said redemption department by the tax collector’s officers.

Finally, regarding *appellant’s* most important “*Exhibit C*,” appellee states:

“... and that on January 10, 1962, in response to a letter from appellant apparently dated December 16, 1961, he was advised by the Tax Collector that the property had been deeded to appellee on October 19, 1960 (*Exhibit C*, Cl. Tr. 114).”

Here again appellee is grossly mistaken since there was *no* advising that the property in question had been deeded but (as covered in appellant’s opening brief, page 10) the “letter” said several conflicting things, each erroneous and utterly misleading, so it was impossible to identify the or any property. On pages 19 and 22 of respondent’s brief this “letter” is covered in effect, with the same misleading representations being made, but it admits as follows at page 19:

“Appellee would point out that the *only* misinformation contained in that letter *is the legal description* contained therein.” (Emp. sup.)

The words “the only misinformation . . . is the legal description” might be taken facetiously if it were not so frivolous. What else is there to identify such real property? — But even the foregoing is only half the truth. Said “letter,” as is pointed out at *page 10* of appellant’s opening brief,

“... IS A LETTER FROM APPELLEE’S OFFICERS DESCRIBING THE PROPERTY BY WHAT IS ACTUALLY A LEGAL DESCRIPTION CONSISTING OF *ONLY 10 ACRES*, ALTHOUGH THIS SAME LETTER SPECIFICALLY STATES IT TO BE 40 ACRES. IN REAL FACT APPELLANT’S LETTER OF INQUIRY REQUESTING INFORMATION CONCERNED AND DESCRIBED A TOTAL 200 ACRES, THE CORRECT AMOUNT OF HIS PROPERTY INVOLVED.”\* (Emp. sup.)

Again on page 22 appellee discusses “the letter” and it in good conscience assumes for the purpose of argument: that “*appellee should be estopped* from asserting statute of limitations *because* appellant *was misled* to his *detriment* . . .” Then appellee continues:

---

\*As listed in Mr. Skinner’s letter (infra, and appendix).



“... he was not so misled subsequent to January 10, 1962 ...”

“... and any misrepresentations, if any there were, were cured as of that date : . . .”

Hence it will be seen it is not a case of assuming for the sake of argument. Instead, appellee has itself shown the argument is controlling because there was *no curing* by that “letter of January 10, 1962.” How could there be? There was no possible identification of the 200 acres of property actually involved. Only a letter that said two erroneous conflicting things: a legal description of 10 acres; an area of 40 acres.

Appellee never does make clear when it actually conveyed the true information as to the property involved to appellant despite, as has been shown, a continuing volume of correspondence with appellee’s officers right up to the date of filing suit.

Appellee makes a fatal error on page 22 wherein it stipulates that *estoppel* would apply “for a period not to exceed *one year* subsequent to *the time* appellant was advised of the *disposition of his property*; i.e., up and until January 10, 1963.” Hence, even granting appellee its limitation on the application of estoppel, then according to its own interpretation suit was timely filed: said “letter of January 10, 1962” did not advise on the “disposition of [appellant’s] property” because it was not identified. Whereas, when the actual time

of the “disposition of his property” was known [it] was *within a year* of the time of filing suit; therefore, for these reasons alone appellant should prevail.

The foregoing is proven by the following, beginning with an excerpt from appellant’s letter dated *April 18, 1963* to appellee’s Deputy County Counsel, *Mr. John D. Cahill*, which said in pertinent part:

“I have not had responsive answers from your officers in the real estate department and tax collector’s office. Particularly, in the *letter of January 10, 1962*, the description of the property is given as 40 acres, NW¼ of NW¼ of SE¼ of Section 15, 5 North 17 West . . .” (Emp. sup.)

Then, in response to the above letter, a letter was received from Mr. Skinner dated *April 30, 1963*, the entire body of which is hereby quoted with emphasis supplied:\*

“In reply to your letter of April 18, 1963 to Mr. John D. Cahill, Deputy County Counsel regarding the description of the property in Section 15 T5N R17W please be advised that it was assessed as two separate parcels, described as follows:

“*160 acres NW¼ of Sec 15 T5N R17W and 40 acres NW¼ of SE¼ of Sec 15 T5N R17W.*”

The controlling facts are, then: It was not until Mr. Skinner’s letter of *April 30, 1963* that there was a cor-

---

\*A reproduction of this letter is placed in the appendix. Of course, this is the same Mr. Skinner who is mentioned so prominently in appellee’s brief (pages 2, 3, 4, 17).

rect legal description of the property involved to actually inform appellant that it was his land that had been taken. However, there was still a lack of clarity which is shown by appellant's subsequent letter of *May 2, 1963* to Mr. Skinner as follows:

“Answering your letter of April 30th regarding erroneous description of my land, will you please admit that you did make an error previously on the description? That was the point of my letter to the County Counsel.

“Also, did you acquire the property on the same operation?” [“The two separate parcels”]

No reply was received by appellant from Mr. Skinner: the errors were never admitted until it was so done in appellee's brief herein. Finally a letter dated *August 27, 1963* from Mr. Cahill invited appellant to file suit admitting in effect that the very constitutional question was involved that has been so held by this Court and upon which this action was based:

“We realize that you disagree with our position in this matter, but that is your *constitutional prerogative*. We respect your position, but we disagree with it, and in order to resolve these differences, it would appear that the matter *will have to be litigated*.” (Emphasis supplied.)

Since the instant action was filed only a few months after receipt of said letter of August 27, 1963, well within the one year date from receipt of Mr. Skinner's

letter of *April 30, 1963* which appellee itself has in effect and for all practical purposes stipulated, on its own interpretation of estoppel would be a basis for such estoppel, it would, therefore, seem that appellee must *now* concede that its position is not only weak, but untenable.

### III.

#### **SUMMARY JUDGMENT FOR APPELLEE WAS IMPROPER IN THE INSTANT ACTION.**

On page 6 appellee cites FRCP 56(c) but the quoted excerpts have the proviso “if the pleadings, depositions, answers to interrogatories, . . .”; but defendant has never even answered the Complaint. Appellant has had no opportunity to apply the discovery rules of federal civil procedure. Who can say what he would or could discover? Can appellant be said to have had his constitutional day in court to determine the constitutional question which this honorable Court has held to be “the case”?

Summary judgment for appellant, plaintiff below, would have been proper since there are sufficient admitted facts in his favor which leave no genuine unresolved issues to bar such judgment.

IV.

**APPELLANT'S ADDRESS WAS KNOWN TO THE REDEMPTION DEPARTMENT.**

Appellee has consistently ignored appellant's reference over and over again to the fact that his address was in the redemption department where the address was readily available in processing of the delinquent tax property between the redemption department and the tax deeded department of appellee's affiant Mr. Skinner. Appellant's opening brief statement of case (page 2) :

“... in that notices of such proceedings were not given to appellant although *his name and mailing address were known to the officials of appellee* who conducted such proceedings, and *appeared in the pertinent tax books and records of appellee* . . .”\*

It is apparent that appellee is silent regarding his affiant Mr. Skinner's declaration as to the facts of the above quotation.

---

\*Actually the quoted language is the words of this Honorable Court.

V.

**SINCE THE ADDRESS WAS KNOWN IT DID NOT HAVE TO BE ASCERTAINED. THE PRESCRIBED LAW SHOULD HAVE BEEN FOLLOWED AND APPELLANT SENT A NOTICE.**

On page 9 appellee states a requirement of Revenue Code Sections 3354 and 3355, “. . . to forward a notice thereof by registered mail to the last known assessee.” All the tax collector had to do was look in his redemption department records in order to send the mail to the last know assessee—appellant. The tax collector did not have “*to ascertain the address*” because he already had it in said redemption records. What would be the sense or point of his going to the assessment rolls in a different department to learn (ascertain) something he already knew? Appellee blindly insists without a smattering of logic that the tax collector had the right to close his eyes (ignore his duty and trust). Then appellee backs up the necessity for this (at page 23) on the basis that it was “*excused*” because of the failure to file a property statement. However, there has been submitted several letters\* and sworn evidence (Tr. 138) with respect to appellee’s neighboring and adjacent counties which all say that such a property statement *is not the “mode”* with unimproved real property. Again appellee ignores this evidence.

---

\*The letter in the appendix (A.O.B.), due to printing inadvertance, omitted to identify the County of *Santa Barbara* and the date of Aug. 4, 1965; the other letter is from Ventura County (Tr. 140).



On page 10 appellee admits,

“... the tax collector executes a deed of the property to the County which, *except* as against actual fraud . . .” (Emp. sup.)

Constructive fraud is the same as fraud (insofar as statutes of limitations are concerned (A.O.B. 20)) but while appellant has argued this point extensively, appellee has made no opposition to it or to the said California statute of limitations, Sec. 1573 Civil Code which provides for filing action after discovery.

## VI.

### APPELLEE'S ASSESSOR SUPPORTS APPELLANT.

*The Los Angeles Times* of January 10, 1966 in a subheading on an article on property taxes states some representations of appellee's new assessor as follows:

#### *“Watson's View*

“But for Los Angeles Assessor Philip Watson, a perennial crusader for reform, The property tax picture is probaby as bad as it is painted.”

“‘What's really needed,’ he said, ‘is a complete rewriting of tax laws and tax approaches.’”

Mr. Watson further stated:

“ ‘I'd take the welfare program out of the property tax. I accept that we must have a welfare program. . . .’ ”



Appellant's opening brief points in footnote 1 on page 7 to the fact that the property was his insurance against the necessity of any welfare program and he has sworn in his affidavit (Cl. Tr. 96) that the property is worth over 60 times the debt due appellee yet appellee avers in its brief that "public policy requires the application of the wrong or non-applicable statute of limitation." (Page 21.) Appellant submits that this is strange "public policy" and appellee goes on at this point to attempt to discredit the telephone conversations with its officers, but it cannot discredit the corroborating documentary evidence of that erroneous letter. (*Exhibit C*, Cl. Tr. 114.)

An article with dateline San Francisco (UPI) *December 13, 1965* has the heading:

**"BADLY NEED  
PROPERTY  
TAX REFORM**

"Atty. Gen. Thomas C. Lynch said today the California assessors scandal demonstrates a need for sweeping changes of law, including a limit on property tax levies."

The article went on to quote as follows:

"Investigations indicate transactions whereby public officials receive cash, bank stock and even a Rolls Royce, if you please, from grateful tax consultants."

### CONCLUSION

The conclusion in appellee's brief "requests" the impossible, in other words, that this honorable Court not follow the high standards of fairness and justice which are exemplified by the *Elgass* case and which appellant himself has already received in the prior decision in this case. Appellant, then, does not request but merely relies and trusts in the standards and wisdom of this honorable Court.

Respectfully submitted,

D. J. MILLER,  
plaintiff, *pro se*.

# Appendix



# APPENDIX

---

## COUNTY OF LOS ANGELES

### DEPARTMENT OF TAX COLLECTOR

HALL OF ADMINISTRATION

225 NORTH HILL STREET

CORNER OF TEMPLE AND HILL STREETS

LOS ANGELES 12, CALIFORNIA

April 30, 1963

Mr. D. J. Miller  
Box 728  
Boulder City, Nevada

Dear Sir:

In reply to your letter of April 18, 1963 to Mr. John D. Cahill, Deputy County Counsel regarding the description of the property in Section 15 T5N R17W please be advised that it was assessed as two separate parcels, described as follows:

160 acres NW $\frac{1}{4}$  of Sec 15 T5N R17W and  
40 acres NW $\frac{1}{4}$  of SE $\frac{1}{4}$  of Sec 15 T5N R17W.

Very truly yours,

HAROLD J. OSTLY,  
COUNTY TAX COLLECTOR



L. E. Skinner  
Head Clerk  
Tax Deeded Lands Section

LES-ab

cc - Mr. Cahill

cc - Mr. Allenbaugh



FEB 14 1967  
No.

20436

In the  
United States Court of Appeals  
*For the Ninth Circuit*

---

D. J. MILLER, )  
Appellant, )  
-vs- )  
COUNTY OF LOS ANGELES, a Political )  
Subdivision of the State of Cali- )  
fornia, )  
Appellee. )

---

APPELLANT'S SUPPLEMENT  
TO HIS REPLY BRIEF

FILED  
FEB 14 1967  
WM. D. MILLER

D. J. MILLER  
Post Office Box 728  
Boulder City, Nevada  
Propria persona





No.

In the  
United States Court of Appeals  
*For the Ninth Circuit*

---

D. J. MILLER,

Appellant,

-vs-

COUNTY OF LOS ANGELES, a Political  
Subdivision of the State of Cali-  
fornia,

Appellee.

---

NOTICE OF MOTION;  
MOTION FOR LEAVE TO SUPPLEMENT  
APPELLANT'S REPLY BRIEF

Appellant moves the Court for leave to file a short supplement to his Reply Brief on the following grounds:

Appellant was anxious to comply with the rules of the Court and file his Reply Brief in time, which he did; however, certain further, distinguishing points are evident from a perusal of "Appellee's Brief" in Howard v. State of California,

- b -

216 Cal. App. 2d 281, the case that appellee mistakenly avers to be "identical with the one at bar." Also, on the point of "property statement", from the County of Orange, appellee's neighbor, further corroborating information, received after said Reply Brief was delivered to the printer, is cited. Submitted without oral argument.

Respectfully submitted,

D. J. MILLER,  
Appellant, pro se

No.

In the  
United States Court of Appeals  
*For the Ninth Circuit*

---

D. J. MILLER,

Appellant,

-vs-

COUNTY OF LOS ANGELES, a Political  
Subdivision of the State of Cali-  
fornia,

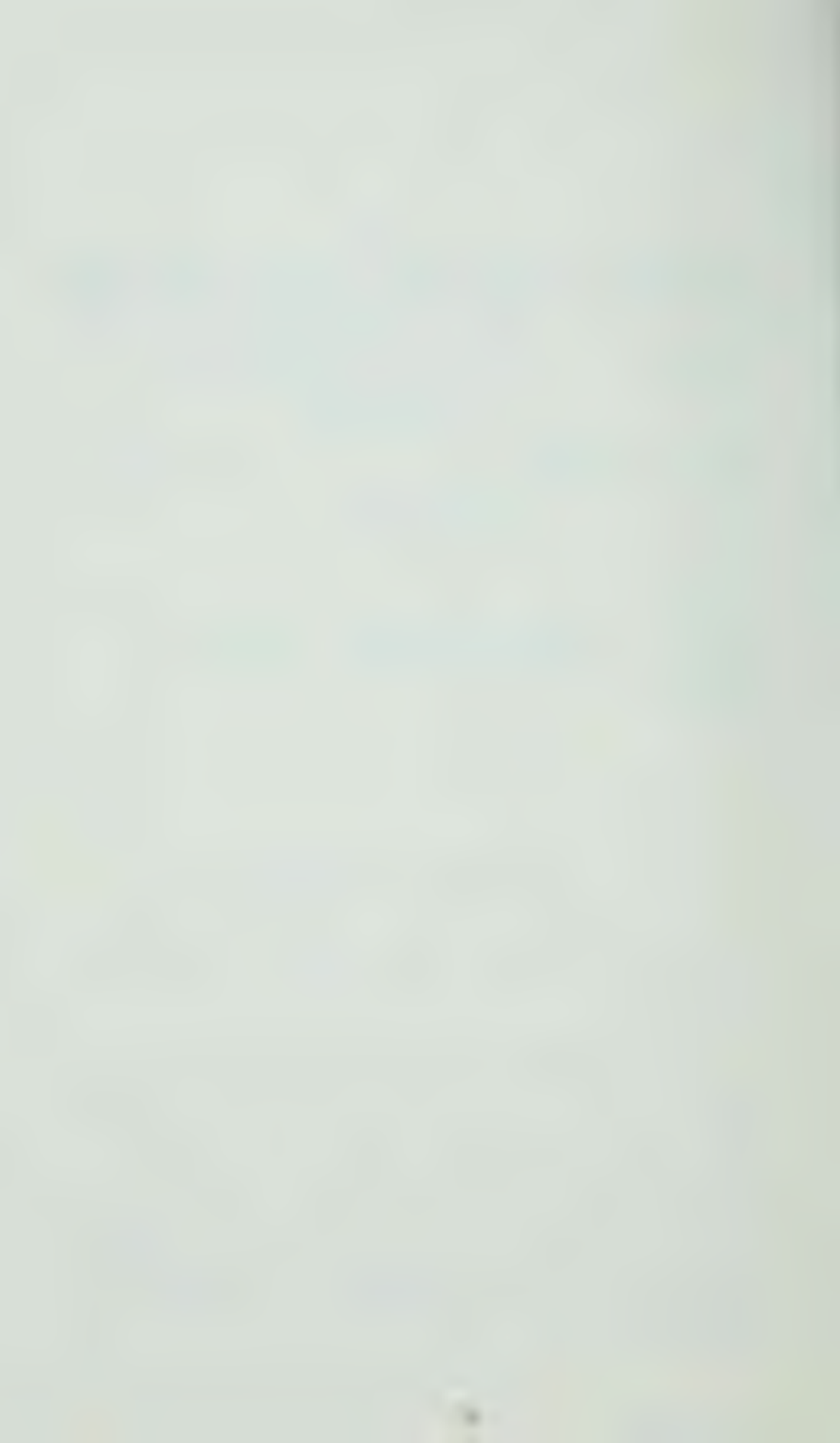
Appellee.

---

APPELLANT'S SUPPLEMENT  
TO HIS REPLY BRIEF

A letter addressed to appellant here-  
in from the County of Orange, office of  
the assessor, dated January 24th, 1966,  
signed by Elmer G. Zimmer states in per-  
tinent part:

"Furthermore, there would never  
be a necessity for filing a prop-  
erty statement on unimproved, raw  
acreage." (Emphasis supplied)



FEB 14 1967

IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

\_\_\_\_\_  
**No. 20440** ✓  
\_\_\_\_\_

ASSINIBOINE AND SIOUX TRIBES, *Appellants*,

*v.*

R. E. NORDWICK, et al., *Appellees*.

\_\_\_\_\_  
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MONTANA

\_\_\_\_\_  
**BRIEF FOR THE APPELLANTS**  
\_\_\_\_\_

MARVIN J. SONOSKY,  
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*Of Counsel:*

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

**No. 20440**

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ASSINIBOINE AND SIOUX TRIBES, *Appellants*,  
*v.*  
R. E. NORDWICK, et al., *Appellees*.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MONTANA

---

**BRIEF FOR THE APPELLANTS**

---

**Opinion Below**

The opinion of the district court (R. 63-81) is not reported. It is set out at pages 63-81 of the record.

**Jurisdiction**

The jurisdiction of the district court was invoked under 28 U.S.C. 1331, on the ground that the matter in controversy arises under the laws of the United States (Act of May 30, 1908, c. 237, 35 Stat. 558, as amended by the Act of March 3, 1927, c. 376, 44 Stat. 1401 (R. 1-2)) and exceeds, exclusive of interest and costs, the sum or value of \$10,000. The



complaint seeks to establish title to the oil and gas underlying 240 acres of land on which a cash bonus of \$4,389.60 for an oil and gas lease had been bid and accepted and seeks damages of \$7,089.60 with interest (R. 3, 55-56, 29, 31). The judgment of the district court was entered August 4, 1965 (R. 88). Notice of appeal was filed August 31, 1965 (R. 90). The jurisdiction of this Court is invoked under 28 U.S.C. 1291.

### Statement

This is an appeal from that part of the judgment of the United States District Court for the District of Montana declaring that the Tribes, appellants, have no right, title or interest in the oil and gas underlying 160 acres of land on the Fort Peck Indian Reservation. (R. 89.) The case presents a question of statutory construction to determine the meaning of the phrase "tribal lands undisposed of", as used in the Act of March 3, 1927, c. 376, 44 Stat. 1401, reserving to the Tribes the oil and gas in "tribal lands undisposed of" on the date of the statute. (The full text of the 1927 Act is printed in the Appendix, *infra*, p. 39.) The issue is whether Congress intended the oil and gas to be retained by the Tribes, or to pass to the holder of an unperfected homestead entry.

In 1888, the Fort Peck Indian Reservation was carved out of a larger reservation which Congress had established in 1874. Act of April 15, 1874, c. 96, 18 Stat. 28, 1 Kappler 149; Act of May 1, 1888, c. 213, 25 Stat. 113, 1 Kappler 261. Initially, all of the land within the Fort Peck Indian Reservation was tribal. In 1908, Congress directed that a portion of the tribal land be allotted in severalty, and the remainder, referred to as "surplus" or "ceded in trust" land, be appraised and "disposed of under the general provisions of the homestead, desert-land, mineral and town-site laws of the United States" for the appraised value,

but not less than \$1.25 per acre. Act of May 30, 1908, sec. 7, c. 237, 35 Stat. 558, 3 Kappler 377. Section 8 of the 1908 Act specified that "when an entryman shall have complied with all the requirements of the homestead law and shall have submitted final proof within seven years from date of entry and shall have made all required payments aforesaid, he shall be entitled to a patent for the lands entered \*\*\*." Until the lands were disposed of, that is when the entryman earned is right to a patent, beneficial title remained in the Tribes. For full text see Appendix, pp. 37-38.) Section 13 of the 1908 Act required "that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof \*\*\*." (For full text see Appendix, p. 39.)

In the 1920's the reservation came to be considered valuable for oil and gas. Neither the 1908 Act nor any other statute provided for oil and gas leasing of "surplus" or "ceded in trust" lands. To remedy this, the 1908 Act was amended by the Act of March 3, 1927, c. 376, 44 Stat. 1401, "by specifically reserving to the \*\*\* [Tribes] the oil and gas in the tribal lands undisposed of on the date of the approval of this Act" and by authorizing oil and gas leasing by the "tribal council, with the approval of the Secretary of the Interior and under such rules and regulations as he may prescribe." (Appendix 39-40; see R. 64.)

Arthur L. Nordwick, appellees' predecessor in title (hereinafter "Nordwick"), filed a homestead application to enter upon the 160 acres in suit on January 24, 1925, before the enactment of the 1927 Act. (Ex. 1; R. 64.) In 1929, Nordwick submitted final proof of compliance with the requirements of the law, except as to payment for the land. After payment was made in 1935, the final certificate was approved and the patent issued. Both the final certificate and the patent reserved the oil and gas to the Tribes, pursuant to the Act of March 3, 1927. (R. 65.)

Some 20 years after Nordwick received his patent reserving oil and gas to the Tribes, the tribal oil and gas were offered at lease sale held at the Fort Peck Agency on September 2, 1955, pursuant to the Indian Mineral Leasing Act of May 11, 1938, c. 198, 52 Stat. 348 (25 U.S.C. 396a, *et seq.*) and the regulations of the Department of the Interior. On September 5, 1955, Carter Oil Company entered the high bid of \$4,389.60 as a bonus for a tribal lease, covering the oil and gas in 240 acres, including the 160 acres on appeal. The Tribes accepted the high bid and a lease was executed on behalf of the Tribes. (R. 65; Ex. 63, pp. 40-45.)

After the tribal sale, Carter acquired from Nordwick an oil and gas lease dated November 15, 1955 to the 240 acres (Ex. 65). Carter then advised the Bureau of Indian Affairs that after investigating the title, Carter was of the opinion that there should not have been any reservation of oil and gas in the patent issued to Nordwick and that a corrected patent should be issued. (R. 66; Ex. 54, December 9, 1955.)

About the same time, Nordwick wrote to the Secretary of the Interior requesting that a "corrected patent issue \* \* \* containing no reservation of the oil and gas rights." (Ex. 55, December 13, 1955; R. 66.) The Field Solicitor, Department of the Interior, ruled that the patent correctly reserved the oil and gas to the Tribes, and that Carter was not entitled to rescission of its lease for alleged failure of title in the Tribes (Ex. 56, February 14, 1956; R. 66).

At the same time, the Field Solicitor advised that since "a property right of the Fort Peck Tribe is challenged, the Tribe should be notified of the raising of this question and given an opportunity to be represented by its own counsel." (Ex. 56, p. 2; R. 67, fn. 2.)

The Bureau of Land Management gave this no heed. Acting on the *ex parte* representation of Nordwick, without notice to the Tribes and without affording the Tribes an

opportunity to be heard, (R. 67, fn. 2), the Bureau of Land Management prepared a draft decision conforming to Nordwick's request that he, and not the Tribes, be given the oil and gas. The draft decision was submitted to the Assistant Solicitor, Department of the Interior, who was the legal advisor on minerals. On March 23, 1956, the Assistant Solicitor directed a memorandum to the Bureau of Land Management, ruling in positive terms that on the date of the Act of March 3, 1927, the 160 acres in suit were in entry status, that the statute itself reserved the oil and gas to the Tribes, and that the lands were "undisposed of" within the meaning of the 1927 Act. The Assistant Solicitor refused to endorse the draft decision. (Ex. 60; R. 66.)

Despite this advice, the Bureau of Land Management, on May 4, 1956, approved Nordwick's application and ordered that a supplemental patent issue to him "eliminating the reservation of oil and gas under the Act of March 3, 1927" (Ex. 61; R. 66). Five days later, on May 9, 1956, a supplemental patent was issued to Nordwick without the reservation of oil and gas. It recited that "This patent is issued supplemental to patent No. 1080633, dated December 13, 1935, which erroneously included oil and gas reservation under the Act of March 3, 1927." (Ex. 62; R. 67.) The record contains no explanation of this action by the Bureau of Land Management contrary to the advice of the Assistant Solicitor.

At no time prior to the issuance of the supplemental patent was any notice, or opportunity, given to the Tribes to present their views, or to defend the Tribes' title, or to participate in the proceedings culminating in the issuance of the supplemental patent to Nordwick. This *ex parte* procedure took place despite the explicit advice of the Field Solicitor, given in February preceding the issuance of the supplemental patent of May 9, 1956 to Nordwick, that the Tribes should

be notified that their title was being questioned and should be given an opportunity to be represented by their own counsel. (Ex. 56, February 14, 1956; R. 67, fn. 2.)

When the matter finally came to the Tribes' attention, they appealed to the Secretary of the Interior on April 11, 1957. No decision of any kind was forthcoming and this suit was brought on July 24, 1963. After suit was filed, the Tribes' appeal was dismissed on the ground that since the supplemental patent had already issued, the Secretary was without jurisdiction (R. 58-62, 67). In other words, the Department so arranged matters that it withheld notice to the Tribes of Nordwick's application for a supplemental patent until it granted Nordwick's application, issued a patent and stripped itself of jurisdiction.

The case was submitted below on the record, consisting of the pretrial order, the admissions of the parties and some 66 exhibits (R. 63). Two tracts of land were involved, identified in the judgment as Tract One—the 160 acres here on appeal, and Tract Two—80 acres, as to which the judgment below is final (R. 88). Nordwick filed his application for homestead entry on the 160-acre tract before March 3, 1927, the date of the 1927 Act and filed on the 80-acre tract after the date of the 1927 Act (R. 64). Nordwick did not fulfill the statutory requirements entitling him to a patent as to either tract until 1935 when payment was made for the land (R. 65).

In the court below the Tribes contended that the 160 acres here on appeal were "tribal lands undisposed of" on the date of the Act of March 3, 1927, since, as of that date, Nordwick, the entryman, had not fulfilled the statutory requirements specified in Section 8 of the 1908 Act (*supra*, p. 3) entitling him to a patent. Nordwick did not do so until 1935. Nordwick contended that entry and disposition were synonymous; that once the land was entered, it was not



“undisposed of” within the meaning of the 1927 Act. (R. 68).<sup>1</sup>

The district court ruled against the Tribes and held that the 160-acre tract here on appeal was disposed of on the date of the Act of March 3, 1927 and entered judgment accordingly (R. 88). This appeal followed.

### Specification of Errors

1. The district court erred in construing a reservation to the Tribes of oil and gas in “tribal lands undisposed of” contained in the Act of March 3, 1927, c. 376, 44 Stat. 1401, to be the equivalent of a reservation of oil and gas in “tribal lands unentered”, thus depriving the Tribes of the oil and gas in favor of an entryman.

2. The district court erred in adjudging that the Tribes have no right, title, or interest in the oil and gas underlying the 160 acres on appeal.

### Summary of Argument

I. The Tribes were never divested of their beneficial title to the oil and gas. Prior to the 1927 Act there had been no divestiture of title. For the Tribes to lose title it was necessary for the entryman to earn the right to a patent by fulfilling the statutory requisites itemized in Section 8 of the 1908 Act. Nordwick did not fulfill these requisites until 1935. Accordingly on March 3, 1927, his entry was inchoate and the oil and gas was subject to displacement by Congress. (*Infra.* pp. 9-11.)

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<sup>1</sup> As to the 80-acre tract, entered after March 3, 1927, Nordwick contended that the Act of March 3, 1927 applied only to lands undisposed of on the day and date of the statute. Prior to March 3, 1927, the 80 acres had been allotted to an Indian. After March 3, 1927, the allotment was relinquished and became available for entry. Norwick entered in 1929. The district court ruled against Norwick on the 80-acre tract. (R. 89.) No appeal has been taken and the judgment is final.

The conclusion below that tribal oil and gas on unperfected entries was given to the entryman is contrary: To the Congressional policy of obtaining value for the Tribes' property interests as part of its obligation as trustee under the 1908 Act; to the reason for the 1927 Act—to provide authority for the Tribes to lease oil and gas; to the language of the 1927 Act, which reserves oil and gas in “undisposed of” tribal lands, not “unentered” tribal lands; to the legislative history of the 1927 Act which bears out the intent to protect the Tribes' oil and gas interests; and to the administrative construction contemporaneous with the issuance of the original patent to Nordwick reserving oil and gas to the Tribes. (*Infra*, pp. 11-15.)

A construction that the Tribes were divested of their oil and gas runs counter to the established meaning of “undisposed of” in public land law. It violates the canons governing the construction of Indian statutes, particularly where there is a Federal conflict in interest between tribal wards and entrymen. (*Infra*, pp. 15-22.)

II. The district court gave no consideration to the materials disclosing the Congressional intent, or to the law governing construction of Indian statutes. The district Court sought to establish other instances where “undisposed of” or “disposed of” meant “unentered”, and on that postulate concluded “undisposed of” in the 1927 Act meant “unentered”. The instances do not support the court's postulate and in any event do not fulfill the obligation to determine the Congressional intent in the 1927 Act. (*Infra*, pp. 22-32.)

III. Nordwick is barred by laches and estoppel. Nordwick waited 20 years after his patent, until the Tribes sold an oil and gas lease to a high bidder and granted a lease, before he applied for a patent to the oil and gas in an *ex parte* proceeding. (*nfra*, pp. 32-35.)



## ARGUMENT

### I. The Tribes are the owners of the oil and gas interest in the 160 acres on appeal.

We start with the proposition that the 160 acres, surface and minerals, were part of the 1888 reservation, beneficially owned by the Tribes, with title in the United States in trust for the Tribes. (See *supra*, p. 2.) The Act of May 30, 1908, was an example of the contemporaneous Federal policy of eliminating communal tribal ownership by allotting and selling the tribal lands. See the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, as amended (25 U.S.C. 331, *et seq.*) ; *Federal Indian Law*, pp. 115-117 (GPO 1958). Until the Tribes were divested of title, they remained the beneficial owners.

A. *The 1908 Act was designed to sell the Tribes' interests in surplus land for fair value with the United States acting as trustee.* The 1908 Act was not passed for the benefit of entrymen. It was designed to obtain for the Tribes the maximum permissible, consistent with the obligation of trustee, which Congress had assumed.

The 1908 Act simply provided a method for disposing of tribal land. Allotments were to be made to each individual member of the Tribes (sec. 2). With respect to the remainder of the land, the objective was to obtain fair value for the Tribes. Unlike public lands, the tribal land was not to be sold at the arbitrary public-land price of \$1.25 per acre, regardless of value. The lands were to be classified and appraised (secs. 4, 5, 6). Particular provision was made to insure higher payment for lands of special worth, as in the case of irrigable lands, coal lands and townsite lots (secs. 1, 10, 14). Mineral lands were classified. Coal lands were appraised. Other mineral lands were not appraised

but were to bring the higher prices provided under the public land mineral laws (sec. 12). After classification and appraisal, all lands were to be "disposed of under the general provisions of the homestead, desert-land, mineral and town-site laws of the United States" for the appraised value but not less than \$1.25 per acre. (sec. 8).

Section 8 of the 1908 Act explicitly spelled out what an entryman had to do to divest the Tribes of title and take title in himself. It specified that "when an entryman shall have complied with all the requirements of the homestead law and shall have submitted final proof \* \* \* and shall have made all required payments [of the sales price of the land], he shall be entitled to a patent for the lands entered: \* \* \*." (For full text see Appendix 37-38.)

Essentially, Congress framed the 1908 Act to employ the public land disposal system to sell the Tribes' lands. But, the buyers were to pay the appraised value, and not less than the public land price of \$1.25 per acre. This negates any suggestion that Congress was acting contrary to its trustee obligation by giving away tribal property.

B. *Beneficial title to the lands remained in the Tribes until they were divested of title.* The Tribes did not sell their lands to the United States. Section 13 of the 1908 Act carefully limited the obligation of the United States to that of "trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received." (For full text see Appendix, p. 39.) In Indian law, such lands are known as "surplus" or "ceded in trust" lands with title remaining in the United States in trust for the tribe until the lands were sold. *Ash Sheep Co. v. United States*, 252 U.S. 159 (1922); *Hanson v. United States*, 153 F.2d 162, 163 (C.A. 10, 1946); *Confederated Band of Ute Indians v. United States*, 100 C. Cls. 413, 431-2 (1943); *Restoration to Tribal Ownership of Ceded Colorado Ute Indian Lands*, 56 I.D.

330, 337-8 (1939); *Restoration of Lands Formerly Indian to Tribal Ownership*, 54 I.D. 559, 560 (1934); *Peter Fredericksen*, 48 L.D. 440, 442 (1922); *Federal Indian Law* (GPO 1958), pp. 710-717; Cohen, Felix S., *Handbook of Federal Indian Law* (1945), pp. 334-5.

Following the 1908 Act the Tribes continued to be the beneficial owners until they were divested of their title, either by allotment, by outright sale and payment, or in the case of a homestead, when the entryman became entitled to a patent by doing all required of him in terms of settlement, improvements and payment in accordance with Section 8 of the 1908 Act (*supra*, p. 3).

In 1927, Congress amended the 1908 Act by "specifically reserving" to the Tribes, "the oil and gas in the tribal lands undisposed of" on March 3, 1927, the date of the Act. (Act of March 3, 1927, c. 376, 44 Stat. 1401; for full text see Appendix, 39-40.) On March 3, 1927, Nordwick was an entryman who had not fulfilled the requisites of Section 8 of the 1908 Act, and was not entitled to a patent (R. 65). The essence of the case is whether in the 1927 Act, Congress reserved the oil and gas in Nordwick's entry to the Tribes. There is no dispute as to the power of Congress to do so (R. 69). *Wyoming v. United States*, 255 U.S. 489, 497-498, 501-502 (1921).

C. *The reasons which evoked passage of the Act of March 3, 1927 preclude the view that the oil and gas go to the unperfected entries.* Beginning in the 1920's oil and gas values were indicated on the Fort Peck Indian Reservation. Leasing was the only method fair to both owner and operator for the development of oil and gas. It was the method adopted by the United States for its own lands, in lieu of the prior policy of transferring title to oil and gas under the public land mineral laws for nominal sums. Mineral Leasing Act of 1920 (30 U.S.C. 181, *et seq.*); *Ickes v. Development Corp.*, 295 U.S. 639, 645 (1935). Yet the leasing pro-

tection the Government had accorded itself had not been extended to the Tribes' oil and gas lands.

There was no statutory authority to lease the Tribes' oil and gas. The 1908 Act contained none. Under that Act, oil and gas went gratis with the surface. The Mineral Leasing Act of 1920 (30 U.S.C. 181, *et seq.*) was confined to oil and gas deposits "owned by the United States", and did not apply to tribal lands, not even those ceded in trust. 34 Op. A.G. 171 (1924); *Haley v. Seaton*, 281 F.2d 620, 623 (C.A. Dist. Col. 1960). See also, *Peter Fredericksen*, 48 L.D. 440, 443 (1922) where the Secretary of the Interior made the same ruling with respect to Fort Peck coal lands—"the Fort Peck surplus coal lands are Indian lands \* \* \*." The Indian oil and gas leasing statute then in force had no application to Fort Peck lands. It applied only to lands "occupied by Indians who have bought and paid for the same \* \* \*." (25 U.S.C. 397, 398.) A leasing statute passed in 1927 was limited to Executive Order reservations. Act of March 3, 1927, c. 299, sec. 1, 44 Stat. 1347, 25 U.S.C. 398a. Since the Fort Peck Reservation was created by statute, that Act had no application. (See *supra*, p. 2.) As matters stood, the Tribes were the beneficial owners of all minerals, including the oil and gas, in their undisposed of lands. But there was no authority to lease oil and gas, or any other minerals. It was to remedy this situation that proposed legislation was introduced to authorize oil and gas leasing by the Tribes. But to supply the remedy did not require Congress to divest the Tribes of their oil and gas in unperfected entries. And Congress did not do so. The legislative history bears this out.

D. *Nothing in the legislative documents supports the view that Congress intended to divest the Tribes of their oil and gas.* As introduced, the bill which became the 1927 Act, provided that "coal and other minerals, including oil and gas, in the tribal lands \*\*\*\* not disposed of at the time

of the passage of this act \*\*\* are hereby reserved specifically to the [Tribes] \*\*\*, and the title to all mineral deposits reserved to the United States within such reservation and not disposed of at the time of the passage of this act is hereby reinvested in such Indians [Tribes].” The bill also provided authority for the tribal council to grant oil and gas leases with the approval of the Secretary of the Interior. (H.R. 10976, printed in part in H. Rept. No. 1966, 69th Cong., 2d sess., (serial 8689) (1927) p. 2.)

In his report on the bill the Secretary of the Interior pointed out that Section 12 of the 1908 Act made applicable the public coal and mineral land laws under which the lands were subject to exploration, location and purchase for the appraised value, but not less than the statutory minimum. He went on to say “However, no mention is made in section 12 or elsewhere in the act of 1908 of oil and gas deposits. In view of the fact that the interests of the Indians are cared for under existing law with respect to the proceeds from the sale of their surplus lands, including coal and mineral lands, the necessity for the legislation provided by section 1 is not apparent except as to oil and gas deposits.” H. Rept. No. 1966, *supra* p. 2.<sup>2</sup> The bill was restricted to oil and gas as recommended by the Secretary and enacted into the Act of March 3, 1927. H. Rept. No. 1966, *supra*, p. 1.

As this review shows, the Secretary pointed out the need for legislative protection of oil and gas deposits. H. Rept. No. 1966 *supra*, p. 2. In no way did he limit the need to oil and gas deposits on unentered land. No mention was made of the subject. If there had been an intent that the oil and gas attach to the inchoate rights of entrymen or settlers, it would have been expressed in the statute, or

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<sup>2</sup> S. Rept. No. 1632, 69th Cong., 2d sess. (1927) on the same bill, simply reports the bill favorably as passed by the House and attaches H. Rept. No. 1966 as fully setting forth the facts.



mentioned in the legislative history. Instead of "undisposed of", the phrase "unentered" or "unentered and vacant" might have been used. Or the reservation of oil and gas might have been made "subject to existing rights and interests". Where Congress intends to preserve outstanding rights, such provisions are common in Indian land statutes.<sup>3</sup>

Here there was no reason for such provisions. Entrymen under the 1908 Act had no rights in the oil and gas. Here also, the choice as to who got the oil and gas, was not between the United States and the entryman, a situation where the Government might give away its own property. Here trust property was at stake and we may not assume that Congress *sub silentio* intended to give it away.

The legislative history establishes that the 1927 Act was a continuation of the Congressional policy to deal with the tribal property on a fair basis. A deficiency in the 1908 Act with respect to leasing oil and gas was remedied by amendment of the original statute. And the amendment applied to all lands held by the United States in trust for the Tribes. It was not limited to "unentered" lands. It applied to "tribal lands undisposed of".

E. *The language of the statute reserves the oil and gas to the Tribes; it does not grant the oil and gas to unperfected entries.* The Act of March 3, 1927 directed that the 1908 Act be "amended by specifically reserving" to the Tribes "the oil and gas in the tribal lands undisposed of" on the date of the Act and authorized oil and gas leasing by the Tribes with the approval of the Secretary of the Interior. (For full text see Appendix 39-40.)

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<sup>3</sup> E.g. Act of August 15, 1953, c. 509, sec. 2, 67 Stat. 592 printed in the historical note following 25 U.S.C. 611; Act of August 10, 1939, c. 662, sec. 1, 53 Stat. 1351, 25 U.S.C. 463d; Act of July 27, 1939, c. 387, sec. 5, 53 Stat. 1129, 25 U.S.C. 575; Act of June 18, 1934, c. 576, sec. 3, 49 Stat. 984, 25 U.S.C. 463.

The question is what did Congress mean by "tribal lands undisposed of" as used in the 1927 Act? Did Congress intend that the entryman, who had not yet earned his title as required by Section 8 of the 1908 Act, should receive the Tribes' oil and gas, or did Congress intend that the Tribes should retain and lease their oil and gas in such lands? More explicitly, did Congress use "undisposed of" as synonymous with "unentered", or did Congress use "undisposed of" to mean tribal lands as to which the Tribes had not been divested of title?

It is the Tribes' position that until the entryman satisfied the requisites of the homestead law, made his final proof and paid the purchase price, all as required by Section 8 of the 1908 Act, he was not entitled to a patent; and that until the entryman was entitled to a patent, title remained in the United States in trust for the Tribes and was undisposed of within the meaning of the 1927 Act. The language, as well as the history and legislative materials relating to the 1927 Act, contain nothing to support the conclusion that Congress used "tribal lands undisposed of" when it meant "tribal lands unentered."

1. *In construing the 1927 Act, the Tribes' rights must be judged by the most exacting fiduciary standards and the Act must be construed to resolve all doubts in favor of the Tribes.* The United States here is acting as trustee for the Tribes under the 1908 Act and its 1927 amendment, with the obligation to dispose of the Tribes' property on a fair basis (*supra*, pp. 9-10). It is a predicate of the Supreme Court decisions dealing with the relationship between the United States and Indian tribes, that the duties owed by the United States to Indian tribes with which it deals are to "be judged by the *most exacting* fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297. "Their [Indian] relation to the United States resembles that of a ward to his guardian." *Cherokee Nation*



v. *Georgia*, 5 Pet. 1, 17. "These Indian tribes *are* the wards of the Nation." *United States v. Kagama*, 118 U.S. 375, 383. (Emphasis in original.) "\*\*\*\*the United States occupies the position and assumes the responsibilities of virtual guardianship, bound by every moral and equitable consideration to discharge its trust with good faith and fairness." *United States v. Payne*, 264 U.S. 446, 448.

In *Choctaw Nation v. United States*, 119 U.S. 1, 28, the Supreme Court stated:

The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. *The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right*, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws. (emphasis supplied.)

In construing the 1927 Act, we must keep in mind that we are dealing with an Indian statute, and all doubts must be resolved in favor of the Tribes. The rule was succinctly put in *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354 (1942) as follows:

"\* \* \* As stated in *Choate v. Trapp*, 224 U.S. 665, 675, the rule of construction recognized without exception for over a century has been that 'doubtful ex-

pressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.'."

In varying form this rule has been expressed in numerous decisions of the Supreme Court. For example, *Worcester v. Georgia*, 6 Pet. 515, 582 (1832), ("The language used in treaties with the Indians should never be construed to their prejudice."); *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886), ("The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, \* \* \*"); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938).

We may not validly charge Congress with an intent to violate its obligation as a trustee. Yet this is the implication of the decision below. It would take extraordinarily clear language to support a construction that Congress availed itself of the advantage of its role as trustee, only to take the oil and gas from the Tribes and donate it to agricultural entrymen who had not yet earned title to their nonmineral land. Such a construction becomes particularly abhorrent when it is considered that if the land were owned by the United States, and not its wards, the oil and gas would not go to entrymen, but would be leased by the United States for itself. Mineral Leasing Act of 1920, *supra* (30 U.S.C. 181 *et seq.*).

Nothing supports a Congressional intent to breach the trust and donate the Tribes' oil and gas to holders of unperfected entries. On the contrary, everything points to an intent to protect the Tribes' oil and gas interests.

2. "*Undisposed of*" in the 1927 Act does not mean "*unentered*". In the first place, the phrase "tribal lands undisposed of" is not language Congress would use if it meant

“tribal lands unentered”, which is the effect of the holding below. The words “undisposed of” have a special meaning in public land law. In public land law, a disposal means a complete alienation, with the vestiture of title in the one to whom the disposal is made. *Arant v. State of Oregon*, 2 L.D. 641 (1883); *State of Oregon v. Frakes*, 33 L.D. 101, 103 (1904); *Oil Prospecting Permits in Power Site Reserves*, 48 L.D. 459, 462-465 (1921).

In the *Frakes* case, the Secretary stated, *ubi supra*:

“It [disposal] is that final and irrevocable act by which the right of a person, purchaser, or grantee, attaches, and the equitable right becomes complete to receive the legal title by a patent or other appropriate mode of transfer. Until that act the land is not disposed of, and in absence of any provision saving or preferring any particular inchoate equity, as that of a settler, disposal by Congress is absolute to the displacing of inchoate rights \* \* \*.”

In *Oil Prospecting Permits in Power Site Reserves*, the Secretary ruled (48 L.D. 464):

“\* \* \* the word ‘disposal’ in itself means as used in the section referred to [reserved from entry, location, or other disposal], an *alienation* of property. The word ‘disposal’ being a word of broad and varied significance its meaning is determined by its connection with other clauses. In this instance the word ‘disposal’ being used in connection with the words ‘entry’ and ‘location’ is subject to but one meaning, i.e.—an investiture of title. (Emphasis in original.)

In the case at bar there was no provision in the 1927 Act saving, or conferring a preference on, the inchoate equity of the entryman. If the 160 acres had been public land, the

oil and gas would have gone to the United States. The established meaning of words should not be changed to give a lesser degree of protection to trust land than the Government gives to its own land.

On March 3, 1927, the 160 acres were "undisposed of". Nordwick had not earned the right to a patent. As an entryman he had not done all that the law required of him.<sup>4</sup> "Until that act, the land is not disposed of, \* \* \*." *State of Oregon v. Frakes, ubi supra*. Any time prior to that point, it stands undisputed in this case that the entryman's inchoate rights may be displaced by Congress (R. 69). *Wyoming v. United States*, 255 U.S. 489, 497-498, 501-2 (1921) (state selection); *Shriver v. United States*, 159 U.S. 491, 497 (1895) (homestead entry); *Yosemite Valley Case*, 15 Wall. (82 U.S.) 77, 87-8 (1873) (pre-emption claim); *Wilbur v. United States*, 53 F. 2d 717, 720 (C.A. Dist. Col. 1931), certiorari denied 284 U.S. 687 (homestead entry). And this is what Congress did when it "specifically reserved" the oil and gas in "tribal lands undisposed of" on the date of the 1927 Act.

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<sup>4</sup> Nordwick filed his application to enter the 160 acres as homestead under the Enlarged Homestead Act of February 19, 1909, c. 6, 35 Stat. 639 (43 U.S.C. 218), and the Fort Peck Act of May 30, 1908 (R. 64; Ex. 1). Under the homestead law, he was obliged to do certain cultivation work over a period of three years (43 U.S.C. 218), and under Section 8 of the 1908 Act (Appendix p. 38) he was obliged (a) to pay the appraised value of the land, one-fifth with the application for entry and the balance in five equal annual installments, (b) to comply with all requirements of the homestead law, and (c) to submit final proof within seven years, as extended, from the date of entry.

On March 3, 1927, the date of the 1927 Act, this is how matters stood with respect to Nordwick's entry on the 160 acres on appeal. For almost two years there had been on file and allowed, an application to enter the 160 acres under the homestead law. The initial one-fifth (\$224) of the appraised value (\$1120) had been paid at the time of filing (Exs. 1, 27). As of March 3, 1927, no part of the balance of \$896 had been paid (Exs. 27, 31, 36). Nordwick did not make final proof and payment until 1935 when the final certificate and patent issued, both with a reservation of oil and gas to the Tribes. (R. 65; Exs. 31-50.)

In the second place, a conclusion that when Congress employed the phrase "tribal lands undisposed of", it intended to make a donation to the inchoate entry at the Tribes' expense, is at variance with the Congressional objective to obtain fair value for the tribal property. This objective is expressed by the whole design and plan of the 1908 Act. It is evidenced by the requirements of classification and appraisal, the call for payment of the appraised price, but not less than the public land price of \$1.25 per acre, and by the explicit demand that all statutory requisites be satisfied, including payment in full of the sales price, before an entryman was entitled to a patent. (See *supra*, pp. 9-10.)

There is no warrant for saying Congress amended its 1908 plan of disposal, not to continue its protection of its tribal wards' interests, but to abandon its trustee obligation. Legislative evidence of the most compelling nature would be required to reach such a result, particularly if the plain, statutory words "undisposed of", were to be given the wholly different meaning of "unentered". Nothing in the legislative history justifies such a construction.

*F. The contemporary construction of the Land Office was that the 1927 Act reserved the oil and gas in the 160 acres to the Tribes.* The Land Office construed the 1927 Act, contemporaneously with its administration, to reserve the oil and gas in suit to the Tribes. After Nordwick made payment in full in 1935, a title report was prepared in the Land Office reciting "Oil and gas in undisposed of lands in Ft. Peck Indian Reserva. reserved 3/3/27 (44 Stat. 1401)" (Ex. 52, October 15, 1935). Thereafter, on November 8, 1935, Nordwick's final certificate was approved. The certificate recited (Ex. 51): "Patent to contain provisions, reservations, conditions and limitations of the Act of March 3, 1927 (44 Stat. 1401) as to oil and gas". The patent, itself, in the language of the 1927 Act, explicitly reserved the oil



and gas to the United States for the benefit of the Tribes (Ex. 53).

This review confirms the contemporaneous administrative construction and understanding that the 1927 Act removed the oil and gas from disposal to Nordwick. The single possible exception is the letter of March 29, 1930, from the General Land Office, accepting the final proof as to both tracts, subject to payment of the balance due. The letter advised the register and receiver to note on the final certificate that "the oil and gas in the additional entry [80 acres adjudicated below] is reserved under the Act of March 3, 1927, to the Fort Peck Indians" (Ex. 64). The letter is silent as to a similar reservation for the 160 acres. Both the final certificate and the patent noted the reservation of oil and gas as to both the 80 acre entry and the 160 acre entry on appeal (Exs. 51, 53; R. 65).

The officers responsible for the final certificate and the patent recognized that the 1927 Act reserved the oil and gas to the Tribes and acted accordingly. The Assistant Solicitor, Department of the Interior, in 1956 pointed out that since the statute itself reserved the oil and gas, the patent properly reserved the oil and gas to the Tribes since all of the land was "undisposed of" on March 3, 1927. The Assistant Solicitor, in a memorandum dated March 23, 1956, listing the authorities on which he relied, stated (Ex. 60):

In this connection it is noted that although Nordwick signed a waiver of the oil and gas as to 80 acres only and not as to the remaining 160 acres, the patent reserved the oil and gas in all of the 240 acres. To forestall any possible action to issue a patent for the 160 acres free of any reservation, permit me to point out that the Bureau apparently inadvertently complied with the 1927 act as to that 160 acres, and the patent should stand. There is no requirement in the 1927 act that a grantee consent to the reservation. *In fact, the act it-*

*self reserves the oil and gas in land undisposed of on the date of the act as all of the 240 acres were. (Emphasis supplied.)*

As against this contemporaneous administrative view, the 1956 *ex parte* decision of the Bureau of Land Management (Ex. 61) granting a supplemental patent of oil and gas to Nordwick, should have been rejected out of hand. That decision was makeweight. It has no substance. It is singularly silent with respect to the law and cases bearing on the critical issue of "undisposed of". This, despite the contrary memorandum of the Assistant Solicitor and the cases and principles of law set out in that memorandum (Ex. 60).

But even more ignominious was the purported procedure resulting in the decision. The decision was the product of a unilateral proceeding conducted in the absence of the Tribes, the real parties in interest, and without affording them an opportunity to be heard. Neither Nordwick, the apparent moving party, nor any officer of the Department of the Interior saw fit to notify the Tribes of a proceeding where the title to tribal oil and gas was at stake. This despite the timely advice of the Department's Field Solicitor that the Tribes should be notified of the challenge to their title and given an opportunity to present their views. (Ex. 56, February 14, 1956; R. 66, 78.) As against the administrative view, contemporaneous with the issuance of the original patent in 1935, this 1956 action is entitled to no consideration.

## **II. The district court did not correctly construe the 1927 Act.**

The court below construed the 1927 Act as if it read "tribal lands unentered" instead of "tribal lands undisposed of". The district court read the 1927 Act as if it



contained a proviso that the inchoate rights of entrymen were unaffected by the reservation of oil and gas. There is no valid support for so construing an Indian statute relating to trust property. (See *supra*, pp. 15-17.)

The opinion below does not reflect that the trial court undertook to ascertain the intent of Congress in the 1927 Act, by a review of the problem Congress sought to remedy; by analysis of the legislative history; or by recognition of the significance of the use of the words "tribal lands undisposed of" instead of language affirmatively conferring the oil and gas on incipient entries. The opinion is silent on the fact that we are dealing with trust property and an Indian statute. No reference is made to the canons governing the statutory construction of Indian statutes (see *supra*, pp. 15-17).

A. *For its guiding principle the court below did not rely on public land law but on general law derived from the construction of a sales contract.* The district court's approach was quite artificial. For a definition of "undisposed of" it did not turn to the public land statutes and decisions. It's postulate was the Supreme Court's observation that the words "dispose of" used in an ordinary sales contract between private parties, has no well defined legal meaning but in "each instance must be taken in connection with the circumstances in which it is used." (R. 68; citing *Hill v. Sumner*, 132 U.S. 118, 123 (1889).) Even that standard would be unobjectionable if properly applied. But here there was no call to invoke a sales contract principle. Section 7 of the 1908 Act explicitly directed that "the lands shall be disposed of under the general provisions of the homestead \*\*\* laws of the United States, \*\*\*." And Section 8 of the 1908 Act in terms required the entryman to comply "with all the requirements of the homestead law \*\*\*." These are the sections under which Nordwick proceeded.

We perceive no reason to depart from the definitions of "undisposed of", in the body of law controlling public land entries (*supra*, pp. 18-19), to seek out a general principle recited in a case involving a private, commercial sales contract.

B. *The district court's illustration of instances employing the phrases "undisposed of" or "disposed of" do not support the district court's conclusion.* As we analyze the opinion below, the district court relied on apparent instances where the phrase, "undisposed of", did not necessarily mean land where there had been final divestiture of the Government's title, and concluded that, therefore, the phrase did not have that meaning when used in the 1927 Act (R. 68-73, *passim*). The court's illustrations do not support its conclusion.

1. *The court below erroneously utilized Section 11 of the 1908 Act.* The court cited Section 11 of the 1908 Act (R. 69-70) as one of the instances where the phrase did not connote final divestiture. Preliminary to a discussion of Section 11, it should be noted that Section 8 of the 1908 Act, provided, that after classification and appraisal, the land would be opened to entry by proclamation of the President for the appraised price, but not less than \$1.25 per acre. The entryman was to pay one-fifth down and the balance in five equal annual payments. The 1908 Act contemplated that some of the lands opened to entry by the proclamation would not be entered and that entries would be relinquished, or canceled.

Section 11, on which the court below relied so heavily, provided for such contingencies. The complete section reads as follows:

That all lands hereby opened to settlement remaining *undisposed of* at the end of five years from the Pres-

ident's proclamation to entry shall be sold to the highest bidder for cash at not less than one dollar and twenty-five cents per acre under regulations to be prescribed by the Secretary of the Interior; and any lands remaining *unsold* ten years after such lands shall have been opened to entry shall be sold to the highest bidder for cash without regard to the minimum above stated [\$1.25 per acre]: *Provided*, that not more than six hundred and forty acres shall be sold to any one person or company. (Emphasis supplied.)

We see that Section 11 dealt with lands remaining five years after the proclamation and lands remaining ten years after the proclamation. The section refers to lands remaining after five years as "undisposed of" and refers to lands remaining after ten years as "unsold." The five year lands were to be sold to the highest bidder but for not less than \$1.25 per acre. The ten year lands were to be sold to the highest bidder without regard to the \$1.25 minimum.

Reading the whole of Section 11, it seems quite apparent that Congress there was using "undisposed of" and "unsold" interchangeably. In both cases it meant that lands, opened by the Presidential proclamation, which were not under entry at the end of five years were to be sold at auction with a \$1.25 upset price, and those remaining after ten years were to be sold to the high bidder, without the \$1.25 minimum.

The district court dealt only with the words "undisposed of" in the first part of Section 11, and pointed out that if lands for which the entryman had not fulfilled the statutory requirements were "undisposed of," in the sense of final vestiture, then five years after the President's proclamation all entered lands would be up for cash sale (R. 69-70). It is patent that in Section 11 Congress was not directing the

sale of lands already sold, or entered. Yet the use of "undisposed of" in Section 11, apparently influenced the district court in its conclusion that 19 years later when the 1927 Act reserved oil and gas in "tribal lands undisposed of," Congress did not intend to reserve oil and gas in tribal trust lands under unperfected entry.

The court below quoted only a limited portion of Section 11(R. 69). This partial quote and the court's apparent reliance on it, would indicate that the district court overlooked the portion of Section 11 referring to the \$1.25 per acre minimum, to the ten year lands and to the use of the word "unsold" in the corresponding place where "undisposed of" is used in connection with the five year lands. If the position of the words "undisposed of" and the word "unsold" had been reversed in Section 11, the meaning would have been precisely the same, and as we note later, the district court might just as well have made the reverse argument.

Reading all of Section 11 in context with the whole statute, it is unrealistic to say that the phrase "undisposed of" with respect to five year lands meant anything different from the word "unsold" used in the same section with respect to ten year lands. This internal conflict in the language of Section 11 is easily resolved. Both phrases meant "unsold" or "unentered." No other rational meaning is possible. But Section 11 with a built-in language conflict hardly provides support for the conclusion that when Congress used the phrase "tribal lands undisposed of" some 19 years later in an amendatory act designed to reserve the Tribes' own oil and gas, it meant the same thing as lands opened to settlement for five years "remaining undisposed of" as used in Section 11.

As we noted above, the district court might just as well have quoted and relied on the last half of Section 11 containing the word "unsold," instead of the first portion, containing the words "undisposed of." Had it so chosen,

the district court could have pointed out that when Congress meant to exclude lands already under entry, it did so by using the word "unsold," whereas in the 1927 Act, it did not say "unsold," but said "undisposed of." And such a construction would have more closely comported with the principles governing construction of Indian statutes (*supra*, pp. 15-17). Frankly, in our view, neither the "undisposed of" nor the "unsold" arguments based on conflicting language in Section 11, are of any help in determining the intent of Congress in the Act of March 3, 1927. In each instance the words must be given a rational meaning which will carry out the intent of Congress.

2. *The district court's three statutory illustrations (R. 71, fn. 9) do not support its conclusion.* The court below refers to other acts and cites three in which "undisposed of" does not necessarily include unperfected entries, i.e., where the statutory requirements have not been satisfied. (R. 71, fn. 9.) The first is the Appropriation Act of August 1, 1914, c. 222, sec. 9, 38 Stat. 582, 4 Kappler 7. That Act authorized additional allotments at Fort Peck so long as surplus lands remained "undisposed of." This is comparable to the Section 11 illustration (*supra*, pp. 24-27). Obviously an allotment statute may not be construed to create a conflict between an entryman and an allottee. The 1914 Act meant allotments could be made from those surplus lands which were available for allotment. Lands under valid entry are not available for allotment. But such lands are subject to the Congressional power to reserve the oil and gas for the Tribes (*supra*, p. 19).

The Act of February 27, 1917, c. 133, 39 Stat. 944, 30 U.S.C. 86-89, the second statute in the series, was a general statute applicable to all Indian reservations, and did not, as inferred in the opinion below, relate only to Fort Peck (R. 71, fn. 9). The 1917 Act authorized "surplus" Indian



lands classified as coal and "not otherwise reserved or disposed of" to be opened to agricultural entry, reserving the coal to the United States. The particular land, located at Fort Peck, was classified as grazing land, noncoal, under the 1908 Act and thereafter was entered under the 1908 Act. Between entry and final proof, the general 1917 Act became law and the land was reclassified as coal. The instructions issued in the letter of June 25, 1923 referred to by the court below (R. 71, fn. 9) did not turn on the meaning of "not otherwise reserved or disposed of." They rested on the ground that the special 1908 Act controlled over the general 1917 Act. The noncoal classification under the 1908 Act, the entry under the 1908 Act and the fulfillment of the statutory requirements of Section 8 of the 1908 Act, earned the entryman his patent under the 1908 Act. The reclassification under the general statute of the 1917 Act, did not operate to deprive the entryman of the coal. *Circulars and Regulations of the General Land Office*, p. 709 (1924), 51 L.D. 76.

The Act of June 18, 1934, c. 576, sec. 3, 48 Stat. 934, 25 U.S.C. 463, the third statute referred to by the district court in footnote 9 of the opinion below (R. 71), authorized surplus, or ceded in trust, Indian lands to be withdrawn from entry and restored to tribal ownership. However the statute explicitly protected outstanding valid rights or claims ("Provided, however, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act \* \* \*.") The quoted language, or similar language, is generally employed when there is intent to protect the rights of entrymen, or settlers, or others with valid claims. (See fn. 3, *supra*, p. 14.) No such language appears in the 1927 Act.

3. *The allotment cases do not support the district court's conclusion.* The court below referred to the allotment case of *Raymond Bear Hill*, 52 L.D. 688 (1929) which stands for

the proposition that the oil and gas pass with an allotment selected and approved before the 1927 Act, but are reserved to the Tribes in an allotment selected and approved after the 1927 Act (R. 71-72). This is consistent with the Tribes' position. Raymond Bear Hill selected a tract of irrigable land and it was recorded on the allotment schedule and approved in 1923 (52 L.D. 690). That allotment selected and approved before the 1927 Act, divested the Tribes of title and on March 3, 1927 the allotted land was not "tribal land undisposed of." Raymond Bear Hill selected a lieu grazing allotment after March 3, 1927 and it was approved in 1929 (52 L.D. 690). On March 3, 1927 the Tribes held title to the grazing land subsequently selected for an allotment and accordingly the 1927 Act reserved the oil and gas to the Tribes.

We fail to see how these principles support the lower court's conclusion. They reflect the Tribes' position.

The court below quotes from a memorandum of the Secretary directed to the Commissioner of the Land Office as to the point in the allotment process at which allotted lands were no longer "tribal lands undisposed of" within the meaning of the 1927 Act. (R. 72.)<sup>5</sup> The Secretary observed that when an Indian selects his allotment and the selection is placed of record, meaning listed on the allotting agents' schedule, the land is disposed of under the 1927 Act. The subsequent approval of the allotment simply confirms the Indian's right. The Secretary pointed out that the Indian had done all that the law required of him.

We agree. When an Indian has selected his allotment and it is recorded on the allotting agent's schedule, he has done all that the law requires of him. There is nothing more he can do. At that point the land is disposed of. It is com-

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<sup>5</sup> The source of the quotation is not identified. Frankly it sounds familiar, but we have not located it in any of the briefs filed below.



parable to the entryman who has performed all the requirements of settlement, improvements and payment under Section 8 of the 1908 Act. He has earned his right to a patent, although the paper has not issued to him.<sup>6</sup>

We think the court below erred when it apparently assimilated the position of an Indian, whose allotment selection was filed and recorded, with that of an entryman, still in the process of earning the right to a patent (R. 72). On March 3, 1927 and thereafter until he paid for the land in 1935, Nordwick was in the position of an Indian who *requested* an allotment, as distinguished from one whose selection of an allotment was recorded on the allotting agent's schedule. Compare, *Arenas v. United States*, 322 U.S. 419, 426-427 (1944); *Wise v. United States*, 297 F. 2d 822, 827 (C.A. 10, 1961).

The court below concerned itself with the decision in *Martin's* allotment reported in *Mineral Reservations in Trust Patents for Allotments to Fort Peck and Uncompahgre Ute Indians*, 53 I.D. 538 (1931) (R. 72-73). Allotments for a number of Indians were selected from tribal lands at Fort Peck pursuant to the 1908 Act. The allotment selections were recorded on an allotment schedule dated February 28, 1927, a few days before the Act of March 3, 1927. The schedule was not formally approved until October 21, 1927, and at that time, Martin's allotment was excluded from approval because of an error on the schedule in the description of his selection. (53 I.D. 543.) The description error was thereafter corrected. The question then posed was whether the trust patent to Martin should reserve the oil and gas to the Tribes in view of the Act of March 3, 1927, which

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<sup>6</sup> In the court below the defendant apparently agreed also. The defendant stated (Def. Br., p. 19): "When a qualified Indian makes a selection of land in the field, he has done everything which is required of him and which he can do. At this point he is in the same position as a *homestead entryman who has made full payment and final proof*." (Emphasis supplied.)

intervened before approval of the allotment with the description corrected.

It is significant that the Commissioner of the General Land Office raised the question apparently because of his understanding, consistent with public land law (*supra*, pp. 18-19), that (53 I.D. 544):

“\* \* \* the words ‘undisposed of’ [as used in the 1927 Act] import a final disposition of, and vested right to the land, and the allotment selection not having received departmental approval, the mere selection did not constitute a vested right.”

The Secretary ruled in favor of the Indian. This was consistent with the principle that when an Indian selects his allotment in the field and the selection is recorded on the allotment schedule, the Indian has done all that he can do, and all that the law requires. He is in the same position as an entryman who has fulfilled all the statutory requirements entitling him to a patent. Insofar as the description of Martin’s selection was erroneously set out on the schedule, the Secretary ruled that this was a clerical error and would be treated as if the schedule had shown the correct description (53 I.D. 543); that since the other selections on the original schedule with Martin’s had been approved, this was the equivalent of an adjudication “that the setting aside of the land as an allotment in the field and its listing on the completed schedule was a disposition of the land within the meaning” of the 1927 Act, even though formal approval of the schedule did not take place until after March 3, 1927. (53 I.D. 544.)

The Secretary’s decisions concerning allotments of tribal land to members of the Tribes, do not support the lower court’s conclusion that the land in Nordwick’s unperfected entry was disposed of. They support the opposite view. To

parallel the position of the Indians who selected allotments, which were recorded or listed on the allotment schedule before March 3, 1927, Nordwick would have had to fulfill all the statutory requirements spelled out in section 8 of the 1908 Act before March 3, 1927. This he did not do.

### III. Nordwick was barred by laches and estoppel from claiming the oil and gas.

Nordwick accepted the certificate of final proof and the 1935 patent both containing the reservation of oil and gas. For 20 years thereafter, he never asserted any claim to the oil and gas. It was not until late 1955, after the lands were known to be valuable for oil and gas, after \$4,389.60 had been bid as a bonus for a tribal oil and gas lease of the lands, and after Carter Oil Company took an oil and gas lease from him, that Nordwick claimed the oil and gas should have been included in his 1935 patent (Ex. 55; R. 65-67).

The district court correctly set forth the position of the Tribes, namely that even if Nordwick had a valid claim to the oil and gas, the supplemental patent was mistakenly issued to Nordwick on the grounds that Nordwick was estopped from obtaining the oil and gas (R. 76). Assuming *arguendo* that the 1935 patent erroneously contained a reservation of oil and gas, the rule is that acceptance of that patent without protest for a long period of time, here 20 years, estopped Nordwick from obtaining the oil and gas. This rule is strictly applied by the Department of the Interior in the case of public land oil and gas owned by the United States. *Conrad Luft*, 63 I.D. 46 (1956) and departmental decisions there cited at page 50. See also the discussion of the cases in the opinion below (R. 76-77).

Certainly the Secretary of the Interior ought not extend a lesser degree of care to trust oil and gas of Indian tribes than he gives to public land of the United States. This is particularly true where the Secretary serves two masters.

Here he has a conflict of interest between his functions as manager of the public lands and his obligations as administrator of Indian affairs and the manager of Indian trust property. To put it another way, if this had been a case between the United States and Nordwick for oil and gas on the public domain, even if Nordwick were right, the Secretary would have rejected Nordwick's bid for a supplemental patent on the ground of estoppel. *A fortiori* it should have been done in the case of trust property.

But here, the Tribes, the real parties in interest, and the only possible parties who could seek review, were kept out of the case by denying them notice of the proceedings. (*Supra*, pp. 4-6.) Here the Tribes, not Nordwick, were the record owners of the oil and gas. Here, the advice of the Solicitor's office not to take the oil and gas from the Tribes was ignored (R. 66, 78). Here, the Bureau of Land Management, self-shielded from the exposure of review, made free to donate the Tribes' oil and gas to Nordwick, 20 years after his patent was issued and accepted, after the oil and gas were known to be valuable, and after the bid of \$4,389.60 for a tribal oil and gas lease had been accepted by the Tribes. Here the 1956 supplemental patent conveying the oil and gas speedily issued (decision dated May 4, 1956, patent issued May 9, 1956, Exs. 61, 62). By speedily issuing the patent, the Bureau of Land Management cut-off the Secretary's jurisdiction and avoided the slim chance that the Tribes might possibly get wind of the proceeding, seek to intervene and appeal to the Secretary. This was consistent with the design for *ex parte* proceedings.

The district court agrees that it would have been better practice for the Department to have afforded the Tribes an opportunity to appear and assert their claim of title. Particularly in view of the express recommendation of the Field Solicitor that this be done (R. 78). But the court observes it is not aware of any statute or regulation requir-

ing that this be done (R. 78). This may be. But, the practice generally followed is to give notice to adverse interests. Apart from this, the decent thing would have been for Nordwick, or the Bureau of Land Management to have served the Tribes with a copy of his application for a supplemental patent. Nordwick had granted a lease to Carter, the high bidder at the Tribes' lease sale, in which he made "no representation of ownership of the mineral rights" and specifically did not "warrant title to the lessee." (R. 66.) It may be safely assumed that both Carter and Nordwick were fully aware of the Tribes' interests.

The district court implies that since the question presented was one of law, rather than fact, *ex parte* proceedings are sanctioned (R. 78). But, if the Tribes had been parties, the defense of laches would certainly have been made before the Bureau with a right of appeal to the Secretary.

The district court is of the view that the Tribes "have suffered no prejudice by the delay in determining the ownership of the mineral rights." (R. 78.) The Tribes put their oil and gas up for public sale. The Tribes accepted the high bid of \$4,389.60. After the high bidder took a lease from Nordwick it sought the return of its money on the ground of failure of title. In addition, the Tribes have been denied the rental they would have received under the lease and possible royalties. We do not follow the lower court's view that the Tribes have not been prejudiced.

Apart from the issue of title, the supplemental patent should be set aside for mistake. Nordwick was barred by laches and estoppel from receiving the oil and gas. The mistake was in not invoking the bar of laches and estoppel and in maintaining *in camera* proceedings to prevent the Tribes from asserting their claim of title and the defense of laches and estoppel.

One thing is certain from the record. Before 1955, Mr.



Nordwick had no notion that he owned, or was entitled to the oil and gas. When he entered the land, it was as an agriculturist. He entered on land classified as nonmineral. He never expected to receive oil and gas, or any other mineral. He never protested the reservation of oil and gas, or other minerals, in his patent. To Mr. Nordwick, the grant of oil and gas was a 1955 windfall arranged *ex parte* by the Bureau of Land Management.

### Conclusion

That part of the judgment below relating to the 160 acres should be reversed with instructions to enter judgment declaring the Tribes the beneficial owners of the oil and gas underlying the 160 acres described in paragraph 3 of the judgment (R. 89).

Respectfully submitted,

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December, 1965

### Certification

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARVIN J. SONOSKY.

## APPENDIX

Exhibits 1 through 66 were received in evidence under the pretrial order (R. 32).

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Selected sections from the Act of May 30, 1908, c. 237, 35 Stat. 558, 3 Kappler 377.

CHAP. 237. An act for the survey and allotment of lands now embraced within the limits of the Fort Peck Indian Reservation, in the State of Montana, and the sale and disposal of all the surplus lands after allotment.

\* \* \* \* \*

SEC. 4. That upon the completion of said allotments the President of the United States shall appoint a commission consisting of three persons to inspect, classify, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians or reserved by the Secretary of the Interior, said commission to be constituted as follows: One of said commissioners shall be a person holding tribal relations with said Indians, one a representative of the Indian Bureau, and one a resident citizen of the State of Montana.

\* \* \* \* \*

SEC. 7. That when said commission shall have completed the classification and appraisement of said lands and the same shall have been approved by the Secretary of the Interior the lands shall be disposed of under the general provisions of the homestead, desert-land, mineral, and town-site laws of the United States, except sections sixteen and thirty-six of each township, or any part thereof, for which the State of Montana has not heretofore received indemnity lands under existing laws, which sections, or parts thereof, are hereby granted to the State of Montana for school pur-



poses. And in case either of said sections, or parts thereof, is lost to the State by reason of allotment thereof to any Indian or Indians, or by reservation or withdrawal under the provisions of this act or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized to select other unoccupied, unreserved, nonmineral lands within said reservation, not exceeding two sections in any one township, which selections must be made within the sixty days immediately prior to the date fixed by the President's proclamation opening the surplus lands to settlement: *Provided*, That the United States shall pay to the said Indians for the lands in said sections sixteen and thirty-six, so granted, or the lands within said reservation selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 8. That the lands so classified and appraised as provided shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late Civil and Spanish Wars and the Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged, but no entry shall be allowed under section twenty-three hundred and six of the Revised Statutes: *Provided further*, That the price of said lands shall be the appraised value thereof, as fixed by said commission, which in no case shall be less than one dollar and twenty-five cents per acre for agricultural, grazing, and arid land, and shall be paid as follows: Upon all lands entered or filed upon under the provisions of the homestead law, there shall be paid one-fifth of the appraised value of

the land when entry or filing is made, and the remainder shall be paid in five equal annual installments in one, two, three, four, and five years, respectively, from and after date of entry or filing, and when an entryman shall have complied with all the requirements of the homestead law and shall have submitted final proof within seven years from date of entry and shall have made all required payments aforesaid, he shall be entitled to a patent for the lands entered: *Provided*, That aliens who have declared their intentions to become citizens of the United States may become such entrymen, but no patent shall be issued to any person who is not a citizen of the United States at the time of making final proof: *And provided further*, That the fees and commissions at the time of commutation or final entry shall be the same as are now provided by law where the price of land is one dollar and twenty-five cents per acre: *Provided*, That nothing in this act shall prevent a citizen of the United States from commuting his homestead entry under the provisions of section two thousand three hundred and one of the Revised Statutes by paying for the land entered the price fixed by said commission, receiving credits for payments previously made.

\* \* \* \* \*

SEC. 11. That all lands hereby opened to settlement remaining undisposed of at the end of five years from the date of President's proclamation to entry shall be sold to the highest bidder for cash at not less than one dollar and twenty-five cents per acre, under regulations to be prescribed by the Secretary of the Interior; and any lands remaining unsold ten years after said lands shall have been opened to entry shall be sold to the highest bidder for cash, without regard to the minimum limit above stated: *Provided*, That not more than six hundred and forty acres shall be sold to any one person or company.

SEC. 12. That the lands within said reservation however classified, shall, on and after sixty days from the date fixed by the President's proclamation opening said lands, be subject to exploration, location, and purchase under the general provisions of the United States mineral and coal land laws

at not less than the price therein fixed and not less than the appraised value of the land, except that no mineral or coal exploration, location, or purchase shall be permitted upon any lands allotted to Indians or withdrawn under the provisions of this act.

SEC. 13. That nothing in this act contained shall in any manner bind the United States to purchase any part of the land herein described, except sections sixteen and thirty-six, or the equivalent in each township, that may be granted to the State of Montana, the reserved tracts hereinbefore mentioned for agency and school purposes, or to dispose of lands except as provided herein, or to guarantee to find purchasers for said lands, or any part thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received.

\* \* \* \* \*

Act of March 3, 1927, c. 376, 44 Stat. 1401, 4 Kappler 944.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Act of May 30, 1908 (Thirty-fifth Statutes page 558), providing for the allotment, sale, and disposal of lands on the Fort Peck Indian Reservation, Montana, is hereby amended by specifically reserving to the Indians having tribal rights on said reservation the oil and gas in the tribal lands undisposed of on the date of the approval of this Act; and leases covering such land for oil and gas may be made by the Indians of the Fort Peck Reservation through their tribal council, with the approval of the Secretary of the Interior and under such rules and regulations as he may prescribe.

Sec. 2. (a) That the title to certain lands on the Fort Peck Indian Reservation, Montana, reserved for agency, school, and other administrative purposes (embracing four thousand and ninety-four and one-hundredth acres), pursuant to the provisions of sections 3 and 16 of such Act, as amended, is hereby reinvested in the Indians having tribal

rights on the Fort Peck Reservation, subject to the continued use of such lands for administrative purposes as long as needed for such purposes in the discretion of the Secretary of Interior.

(b) The Secretary of the Treasury is authorized and directed to deduct the sum of \$5,117.52, representing the purchase price of such lands at the rate of \$1.25 per acre, from moneys in the Treasury arising from the proceeds of the sale of lands disposed of under the provisions of such Act, as amended, and to credit the same to the United States as payment for the lands title to which is reinvested in accordance with the provisions of this section.

(6929-4)

FEB 14 1967

No. 20440

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

ASSINIBOINE AND SIOUX TRIBES, *Appellants*,

*v.*

R. E. NORDWICK, et al., *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MONTANA

BRIEF FOR THE APPELLEES

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APR 1 1966

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WM. B. LUCK, CLERK

Filed ..... 1966  
....., Clerk



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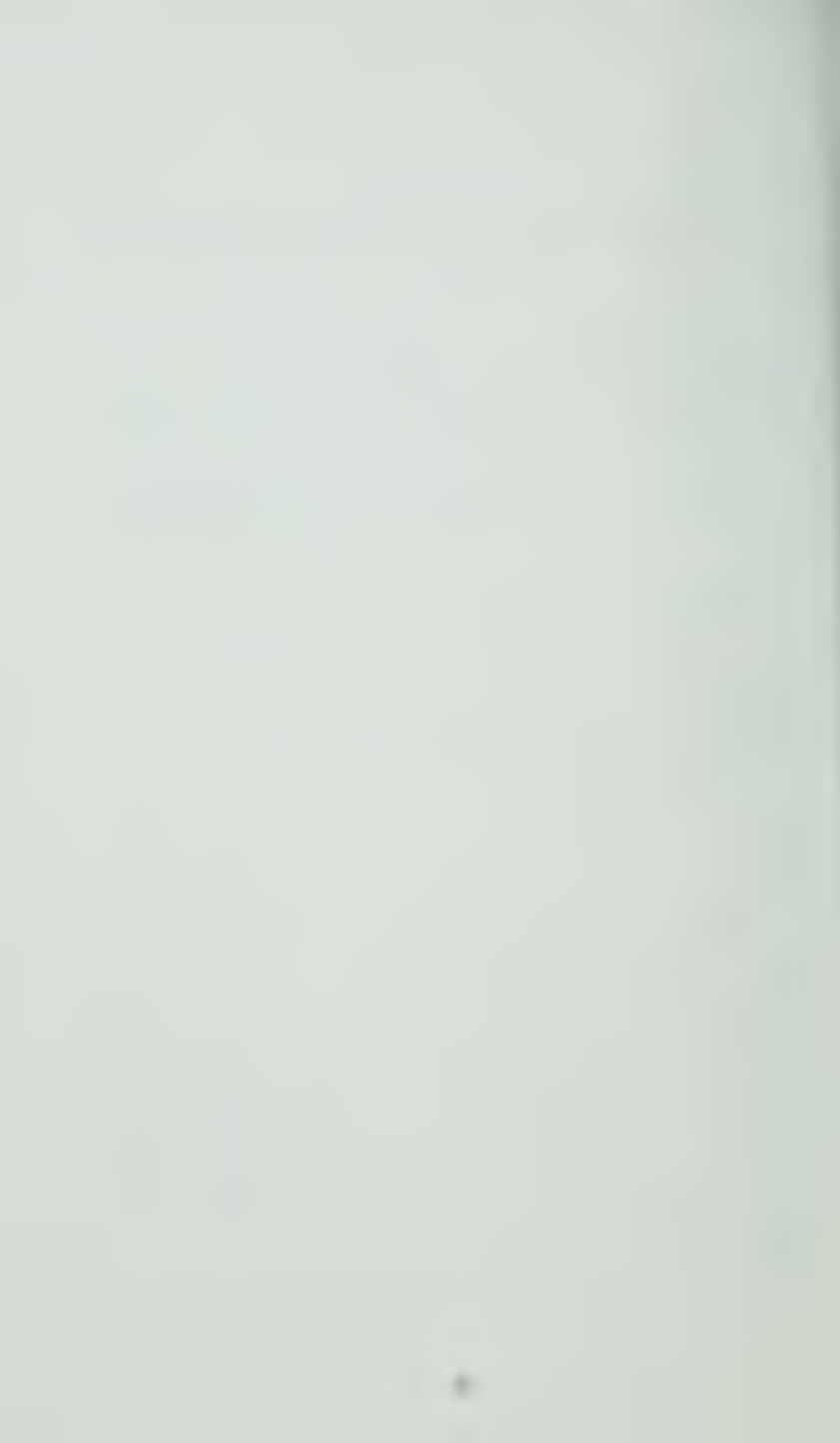
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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
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*v.*

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---

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BRIEF FOR THE APPELLEES

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**STATEMENT**

The statement in Appellant's Brief, adequately summarizes the record and brings into focus the question involved, to-wit: Whether a homestead entry filed and allowed prior to March 3, 1927, culminating in final certificate and patent thereafter, removed the land covered thereby from the oil and gas reservation applicable to "tribal lands undisposed of on the date of approval" of the Act of March 3, 1927 (44 Stat. 1401).

There is, however, one important fact not included in Appellant's statement which should be noted. At the time the Assistant Commissioner of the General Land Office accepted the final

effect given the “undisposed of” provisions, a definite meaning evolved. The special Fort Peck acts of May 30, 1908 (35 Stat. 558), and August 1, 1914 (35 Stat. 582, Sec. 9), contained this precise language, and the Act of February 27, 1917 (39 Stat. 944), referring to coal lands on Indian reservations, contained analogous language. Consideration of each of these acts and the effect given to them through regulations promulgated and instructions issued makes it clear that at the time of 1927 Act was passed the meaning of “undisposed of” was settled as referring only to lands on which no other valid claims or rights had become initiated. It was this meaning which Congress enacted into the 1927 Act. (p.8-12)

## ARGUMENT

### A. THE LOWER COURT CORRECTLY INTERPRETED THE EFFECT TO BE GIVEN TO THE 1927 ACT.

The analysis made by the lower court as to the Fort Peck laws and the administrative effect given to them over the years clearly supports the conclusion that the lands in suit were not “undisposed of” within the meaning of the 1927 Act.

1. *The powers of Congress and the nature of rights under public land laws are not in dispute and are not decisive of the issue involved.* The power of Congress to reserve the oil and gas in lands existing in the circumstances of subject land is not disputed. The question is whether that is what it intended to do and did do by the language used.

Also appellees take no issue with respect to the nature and extent of rights acquired through a homestead entry under the

public land laws. The point of difference is that Appellant asserts that public land law principles control, while appellees take the position that the objectives of Congress concerning the Fort Peck lands, and the provisions enacted to implement them, are special in nature and not to be measured by public land laws and principles.

2. *There is no fixed definition of "undisposed of" or disposed of" which is applicable in this case.* As is stated in the case of *Phelps v. Harris*, 101 U.S. 370; 25 L. Ed. 855:

"The word is *nomen generalissimum*, and standing by itself, without qualification, has no technical signification."

And in *Hill v. Sumner*, 10 S. Ct. 42, 132 U.S. 118; 33 L. Ed. 284:

"The reference of counsel in their briefs to decided cases attempting to define that word are, of course, of very little avail, as in each instance it must be taken in connection with the circumstances in which it is used."

For further cases concerned with the language "disposed of" see:

*McLaren Gold Mines Company v. Morton*, 224 Pac. 2d 975 (Montana).

*Dayton Brass Castings Company v. Gilligan*, 267 Fed. 872, 877.

*Springfield Plywood Corporation v. Commissioner of Internal Revenue*, 15 T. Ct. 701.

27 C.J.S. page 594, et seq.

Appellant cites departmental decisions, reflecting the view which has been taken in connection with certain public land

problems. We are not here concerned with public land concepts nor with the circumstances involved in these decisions. Neither these decisions, nor any others, can be accepted as determinative of the matter, since the meaning of such language in the 1927 Act is dependent entirely upon the circumstances of its use and the objectives sought, as reflected by a consideration of all the Fort Peck laws involved and the purposes behind them. Thus, a review of such laws is material to the issue.

3. *The Act of May 30, 1908 (35 Stat. 558) is the basic Act for disposal of Fort Peck lands and its provisions provide the only proper measure of the nature and extent of rights existing in an entry made on such lands.* The 1927 Act, which is at issue here, is an amendment to the 1908 Act. Therefore, the 1908 Act, as amended prior to 1927, represents the legal climate in which the 1927 Act was born.

The title of the 1908 Act demonstrates its all inclusive purposes and scope. It reads:

“AN ACT FOR THE SURVEY AND ALLOTMENT OF LANDS NOW EMBRACED WITHIN THE LIMITS OF THE FORT PECK INDIAN RESERVATION, IN THE STATE OF MONTANA, AND THE SALE AND DISPOSAL OF ALL THE SURPLUS LANDS AFTER ALLOTMENT.”

A review of the provisions of this Act shows its comprehensive nature, and points up the fact that it is a special law treating a special land situation in the special way required by the fact that it is Indian land to be devoted to the objective, then the government policy, of severing tribal ties, breaking up Indian reservations, individualizing the Indian as a landowner, disposing of surplus lands for their benefit and otherwise at-



tempting to civilize the Indians themselves. (Federal Indian Law, GPO, pages 251-256). This policy was still in effect when the 1927 Act was passed and did not change until thereafter. (Federal Indian Law, GPO, page 256)

The provisions of this Act for disposal of surplus lands to Non-Indians are not only detailed and explicit but unique in their nature. The reclamation and homestead laws are incorporated, but with additions or modifications to meet the peculiar circumstances of the reservation. Water rights, irrigation charges and land reclamation are treated with detailed specifics. Entries are allowed only at the time and in the manner provided by Presidential Proclamation, the amount and due date of payments are prescribed, and special provisions exist as to aliens, as to commutation, as to desert land entries, as to disposal under the reclamation act, as to mineral and coal land laws, as to townsite purposes, etc., (Sections 8 through 14). A Presidential Proclamation opening the land not only provided unusual procedures (Proc. July 25, 1913, IV Kappler 1192) but treated special situations arising, (Proclamations, March 21, 1917, April 28, 1917, March 14, 1918, IV Kappler 970, 978 and 986 respectively).

In other words, this Act was not intended to be operative according to existing public land laws, but in the special manner and on the retailed terms set forth in the Act and in the Presidential Proclamations issued thereunder. It is not a public land law and cannot be gauged by public land law principles if justice is to be done to the rights of those acquiring land thereunder.

This is particularly true with respect to the problem con-

cerned here, i.e., the effect of the language "undisposed of" as used in the 1927 Act.

4. "*Undisposed of*" — 1908 Act: The language "undisposed of" was not new to the 1927 Act. It appears in the 1908 Act as follows:

"Sec. 11. That all lands hereby open to settlement remaining *undisposed of* at the end of five years from the date of President's proclamation to entry shall be sold to the highest bidder for cash at no less than \$1.25 per acre, under regulations to be prescribed by the Secretary of the Interior; . . ." (Emphasis supplied)

The intention of this provision in the 1908 Act is obvious. This Act contemplated disposal of the entire reservation, with the lands in excess of Indian needs to be converted into money for the benefit of the Indians. By specific provision (Sec. 13, 1908 Act) the United States was acting as trustee for the Indians to dispose of the lands and collect and hold the money received for their benefit. Under this responsibility the United States could not allow the disposal processes to stagnate. Thus, the law provided an ancillary means for accomplishing a sale of the lands which, after a reasonable period of time, had not attracted any persons interested in them under the procedures and terms of the homestead method of acquisition. Lands which were in the process of being disposed of through the homestead process, considered to be the more desirable means, could not have been intended as the target for this provision for they were the lands on which the objectives of the Act were being accomplished and with respect to which the obligations of the United States as trustee were being fulfilled. An analysis of the application of this provision to lands already entered will demonstrate the validity of this view.

For example, the date of the President's proclamation to entry was July 25, 1913. Under its terms the first date entry could actually be made on May 1, 1914 under the public drawing system prescribed (Proc. Sec. 6). June 30, 1914 was the first date for settlement and entry in any other manner. (Proc. Sec. 8). Every entryman had 5 years from date of entry to make full payment, and 7 years to submit final proof. (Sec. 8, 1908 Act)

Assume an entry made on May 1, 1914: Final payment would be due on April 30, 1919 and final proof due on April 30, 1921. However, the period prescribed by Sec. 11 of the 1908 Act, being 5 years from date of President's proclamation, would be not later than July 25, 1918. On that date all land remaining "undisposed of" is to be sold to the highest bidder for cash. However, on that date, *neither full payment no final proof were due*. Can it be said, therefore, that "undisposed of" applied to an entry made but not yet paid for or completed? If so, every entry existing would fail and be put on the auction block. This result could not have been intended by Congress and was not followed in actual practice.

5. *Administrative practice — 1908 Act*: The instructions of the Commissioner of the General Land Office on May 14, 1918 (46 L.D. 380) with respect to Section 11 of the 1908 Act shows the effect given to the language "undisposed of". After stating that nonmineral lands opened by the first proclamation would be automatically withdrawn from disposition under the homestead and desert land laws, for the purpose of sale, on July 25, 1918, if then undisposed of, he specifies the situations where the lands will not be considered undisposed of:

"Homestead and desert land entries may be allowed after July 25, 1918, for nonmineral lands on the res-

ervation under the following circumstances:

“(A) A settler on the lands may make entry after July 25, 1918, if he made settlement within three months prior to that time, and presents a proper application to enter within the three months allowed for that purpose.

“(B) Lands which on July 25, 1918, are embraced in a homestead or desert land entry may be re-entered if such entry is cancelled on contest, relinquishment or otherwise.

“(C) Lands which on July 25, 1918, are embraced in a prior withdrawal may be entered if such prior withdrawal is revoked.”

Under those instructions there doesn't even have to be an entry or application on file, mere settlement being a disposal (A). Likewise an existing entry is a disposal (B) and so is a withdrawal of any kind (C).

The conclusion appears inescapable, upon an examination of the 1908 act and the instructions issued thereunder, that “undisposed of” meant land upon which no lawful *claim* had been made, even if such claim constituted an inchoate rather than a vested right.

This is the view which, in effect, was adopted by the lower Court. Appellant in his brief (page 24) disagrees with this conclusion and states that a review of the whole of Section 11 shows that both “undisposed of” and “unsold” are used, the first with respect to lands remaining after five years from Presidential Proclamation and the second as to lands remaining after ten years. His point is not clear other than it is said the two phrases are used interchangeably and that “undisposed of” means “unsold” or “unentered”. (Page 26) Appellees agree that “undisposed of” means “unentered” in the 1908 Act, but

insists that the same language means the same thing in the 1927 Act.

6. "*Undisposed of*" — 1914 Act: The language "undisposed of" was used in another Fort Peck Act, prior to the 1927 Act. (Act of August 1, 1914, 35 Stat. 582, Sec. 9). It reads as follows:

"That the Secretary of the Interior is hereby authorized to make allotments in accordance with the provisions of the Act of May thirtieth, nineteen hundred and eight (Thirty-fifth statutes, page five hundred and fifty-eight) to children on the Fort Peck Reservation who have not received, but who are entitled to, allotments as long as any of the surplus lands within said reservation remain *undisposed of*, such allotments to be made under such rules and regulations as the Secretary of the Interior may prescribe." (Emphasis supplied)

The instructions of the Commissioner of the General Land Office of May 14, 1918, *supra*, also relate to the effect of this act. He states:

"The section last cited (Act of August 1, 1914) will permit allotments to Indians to be made on the lands withdrawn from disposition under the homestead and desert land laws, for the purpose of sale, until such time as the sale is directed by the Secretary of the Interior."

An analysis of this statement will show that this instruction is saying that only those lands on which there is no settlement, even if not filed (A) and no entry (B) or withdrawal (C) are subject to allotment as being lands "undisposed of".

This interpretation conforms to the purposes and objectives of the 1908 Act. If entries then made, but unperfected, were to be considered undisposed of, and therefore subject to allot-

ment, *every homesteader could have had his lands allotted out from under him.*

7. *Act of February 27, 1917 is analogous:* Closely analogous to this situation is the problem presented by the Act of February 27, 1917 (39 Stat. 944, 30 USCA Sec. 87). This Act related to the disposition of coal lands on Indian reservations, with a reservation thereof to the United States. It applied to lands "not otherwise reserved or disposed of". The similarity of the language in this Act of 1917 with the language contained in the 1927 Act, makes appropriate the interpretation and effect given to the coal reservation act. A question arose in applying the 1917 Act to a homestead entry on Fort Peck lands as to whether an entry made June 4, 1915, allowed January 25, 1916, upon which final proof was submitted July 2, 1920, and final certificate issued December 7, 1923, should be patented with a reservation of coal to the United States, the land having been classclassified as coal land on April 17, 1917. In a letter by E. C. Finney, First Assistant Secretary, directed to the Commissioner of the General Land Office, dated July 25, 1924, instructions were given (Circulars and Regulations of the General Land Office, January, 1930, pp. 709-710, 51 L.D. 76) as follows:

"Entries of land in the former Fort Peck Indian Reservation allowed pursuant to the classification provided for by the Act of May 30, 1908, *supra*, and prior to any other subsequent classification of the land as valuable for coal, are not affected by the Act of February 27, 1917, *supra*."

Thus, it appears that although the language "undisposed of" appears ambiguous standing by itself, the truth is its meaning



was well established by administrative practice for many years prior to the 1927 Act. It is to be presumed that if Congress intended, as already stated, that the effect given to this language should be different from the interpretation already existing and in use, it would have provided other language to indicate its intention and desires for a different result. This it did not do.

8. *Act of March 3, 1927*: The circumstances under which the words "undisposed of" were inserted in the 1927 Act shows affirmation by Congress of the meaning established for that language in prior acts through the instructions given and practice followed by the department for a period of many years. The House Report of the Committee of Indian Affairs (H. Rept. No. 1966 69th Cong. 2nd sess. 1927) reveals how these words became inserted in the 1927 Act. Section 1 of the original bill provided:

"That all coal and other minerals, including oil and gas, in the tribal lands within the Fort Peck Indian Reservation, Montana, *not disposed of* at the time of the passage of this act \* \* \* are hereby reserved specifically to the Indians on such reservation, and the title to all mineral deposits reserved to the United States in lands within such reservation and *not disposed of* at the time of the passage of this act is hereby reinvested in such Indians." (Emphasis supplied)

This section was stricken from the bill, at the recommendation of the Secretary of the Interior, and the Section 1 of the Act as finally passed was substituted in its place. The substituted paragraph, in addition to restricting its application to oil and gas, specifically modified the words "not disposed of" to read "undisposed of" resulting in exactly the same language as contained in the 1908 and 1914 Acts. Such detailed consistency



is a strong indication of an intention to continue the interpretation placed upon this language previously settled and in use by the administrative agencies.

Following the passage of the 1927 Act, the effect given to the language in question, as established prior to that enactment, and apparently intended to be continued by the inclusion of such language in the 1927 Act, was continued in a letter of instructions by the Commissioner to the Register, Great Falls, Montana, dated January 18, 1929. This letter states that the reservation of oil and gas provided by the 1927 Act is to be effective to only future applications for homestead entries on Fort Peck lands. It does not state that entries prior to 1927, but uncompleted, are subject to the 1927 Act. This letter (Circulars and Regulations of the General Land Office, January, 1930, pages 715-716) is the document referred to and further substantiated by the decision on Allotments To Fort Peck (and other) Indians (53 L.D. 538), at page 544, which states:

"It is also noticed that regulations of January 18, 1929 (Circulars and Regulations of the General Land Office 1930, pp. 715, 716) providing for reservation of oil and gas under the Act of March 3, 1927 in homestead entries made upon the Fort Peck lands directed that the reservation be made only upon future applications, and made no such requirement as to pending unperfected entries at the date of the Act, which implies the construction that something less than a complete equitable title and vested right to a patent constituted a disposal of the land under the Act."

In view of this it is clear why the Assistant Commissioner, when he wrote the Register in Great Falls accepting the proof submitted by Nordwick, stated that the oil and gas was to be reserved only as to the additional entry and not the 160 acres

concerned in the appeal. (Def. Ex. 64) Unfortunately, and through clerical error, this instruction was not followed. It is also clear from this that the provisions of the final certificate issued did not reflect the practice of the department then in force, but is an example of action taken, by inadvertance, directly contrary to the established practice and the specific instructions issued from Washington, D.C.

9. *Departmental decisions in allotment cases.* The departmental decisions in Raymond Bear Hill, 52 L.D. 688, (July 31, 1929) and Mineral Reservations in Trust Patents for Allotments to Fort Peck and Uncompaggre Ute Indians, 53 L.D. 538, although concerning Indian allotments only, are demonstrative of the interpretation given "undisposed of" as any entry which renders the land no longer subject to other disposal or reservation. This is the case with a homestead entry and the lower court was correct in its assessment of the significance of these decisions in determining the administrative practice established under the 1927 Act.

10. *Administrative interpretation, of long standing, is entitled to great weight.* There are no Court decisions defining the effect given to "undisposed of" in the Fort Peck laws or the laws of any other reservation. But a definite meaning has evolved through administrative effect given, and continued over the years, as applicable not only to the land in dispute, but to all land similarly situated. Although not controlling upon the Courts, the decisions of the department are entitled to great weight.

"Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results.

The situation, therefore, calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect and, if acted upon for a number of years, will not be disturbed except for very cogent reasons." *Logan v. Davis*, 34 S. Ct. 685, 233 U.S. 613, 58 L.Ed. 1121.

See also: *LaRoque v. United States*, 239 U.S. 62, 64; 60 L.Ed. 150; 36 S.Ct. 23, *McLaren v. Fleischer*, 256 U.S. 477, 481; 65 L.Ed. 1053; 41 S.Ct. 578, *Swendig v. Washington Water Power Company*, 265 U.S. 331; 68 L.Ed. 1040; 44 S.Ct. 499, *United States v. Minnesota*, 270 U.S. 181, 205; 70 L.Ed. 549; 46 S.Ct. 305, *Norwegian Nitrogen Products Company v. United States*, 288 U.S. 294, 315; 77 L.Ed. 807; 53 S.Ct. 358. *United States v. Jackson*, 280 U.S. 183, 193; 74 L.Ed. 361; 50 S.Ct. 143.

This rule is of particular force where the administrative agency interpreting it sponsored or participated in its drafting and enactment, as is the case here. *Blanset v. Cardin*, 256 U.S. 319; 326.

The rule is further fortified where the administrative interpretation has apparently been acquiesced in by Congress by its failure to interrupt the already settled interpretation given prior to the amendment consisting of the 1927 Act. *United States v. Leslie Salt Company*, 350 U.S. 383, 396; 100 L.Ed. 451; 76 S.Ct. 424.

11. *Possible widespread effect of problem involved*: Also to be considered is the fact that although this phase concerns only 160 acres, a large quantity of other lands may be affected by this same problem. In the testimony of Mr. Charles Eggers, Superintendent of the Fort Peck Indian Agency, before the

Senate Subcommittee of the Committee on Indian Affairs, held July 23, 1929, at Poplar, Montana, (page 12322), the following statement appears:

“We have 147,452 acres of land, homestead land on this reservation yet that has not been patented — the reason being that final payments have not been made.”

Reference is also made to the case of *Fort Peck Indians v. United States*, 132 F.Supp. 222, from which it appears within the four fiscal years ending June 30, 1917, 604,885 acres had been entered. This case will also show the difficulties which the entrymen had in paying for the entered lands, resulting in extensions of time granted by the Act of March 3, 1925 (53 Stat. 1267, 4 Kappler 507) and the Act of June 15, 1926 (44 Stat. 746, 4 Kappler 559).

From all this it appears that the problem here concerned may be common to a very substantial amount of acreage lying within the Fort Peck Reservation. If all of the entries outstanding were completed, with patents issuing without reservation of the oil and gas for the tribe, in conformity with the then departmental instructions and practice, they will be affected by the decision in this case. A duty will then presumably be imposed upon the United States to take action in a very large number of cases to secure restoration of tribal ownership of the oil and gas.

12. *Acts extending payment due date:* It is to be noted that the language of the Act of June 15, 1926, *supra*, recognizes that the status of lands subject to an existing entry is different from that existing with respect to tribal lands. Section 2 of the act, provides as follows:

"Section 2. Upon failure of any person to make complete payment of the required amount within the period of any extension granted in accordance with the provisions of this act, the homestead entry of such person shall be cancelled *and the land shall revert to the status of other tribal lands of the Fort Peck Indian Reservation.*" (Emphasis supplied)

B. NORDWICK WAS NOT BARRED BY LACHES OR ESTOPPED FROM CLAIMING THE OIL AND GAS.

1. *Lower Court's view is correct.* The lower court's treatment of the Appellant's claim that Nordwick was barred by laches and estopped is correct. The question is one of law rather than fact. The departmental decisions referred to in Appellant's brief were properly distinguished by the lower court.

Issuance of the supplemental patent conveying the oil and gas in the land in suit only constituted conforming the record to the effect of the law in force at the time of the original patent. It corrected the error made when the patent was issued on terms contrary to instructions given and the practice then established.

2. *Grant under a patent is controlled by statute.* It is well settled that the grant in a patent is measured by the statutes under which it is issued. The law inserts a reservation where the statute requires it, even when omitted in the patent. *United States v. Frisbee*, 57 F.Supp. 299. Conversely, the law grants what is provided by statute even if reserved or excepted by the terms of the patent. As stated in *Francoeur v. Newhouse*, 40 F. 618:

"... An exception inserted in a patent, in express terms, by the secretary of the interior, not required or authorized by the statutes, is void."

See also: Burke v. Southern Pacific Railroad Company  
234 U.S. 669, 710; 58 L.Ed. 1527; 34 S.Ct. 907, and  
Cowell v. Lammers, 21 F. 200,208, and United States  
v. 3.08 acres of land, 209 F.Supp. 652.

## **CONCLUSION**

The judgment below relating to the 160 acres should be affirmed.

Respectfully submitted,  
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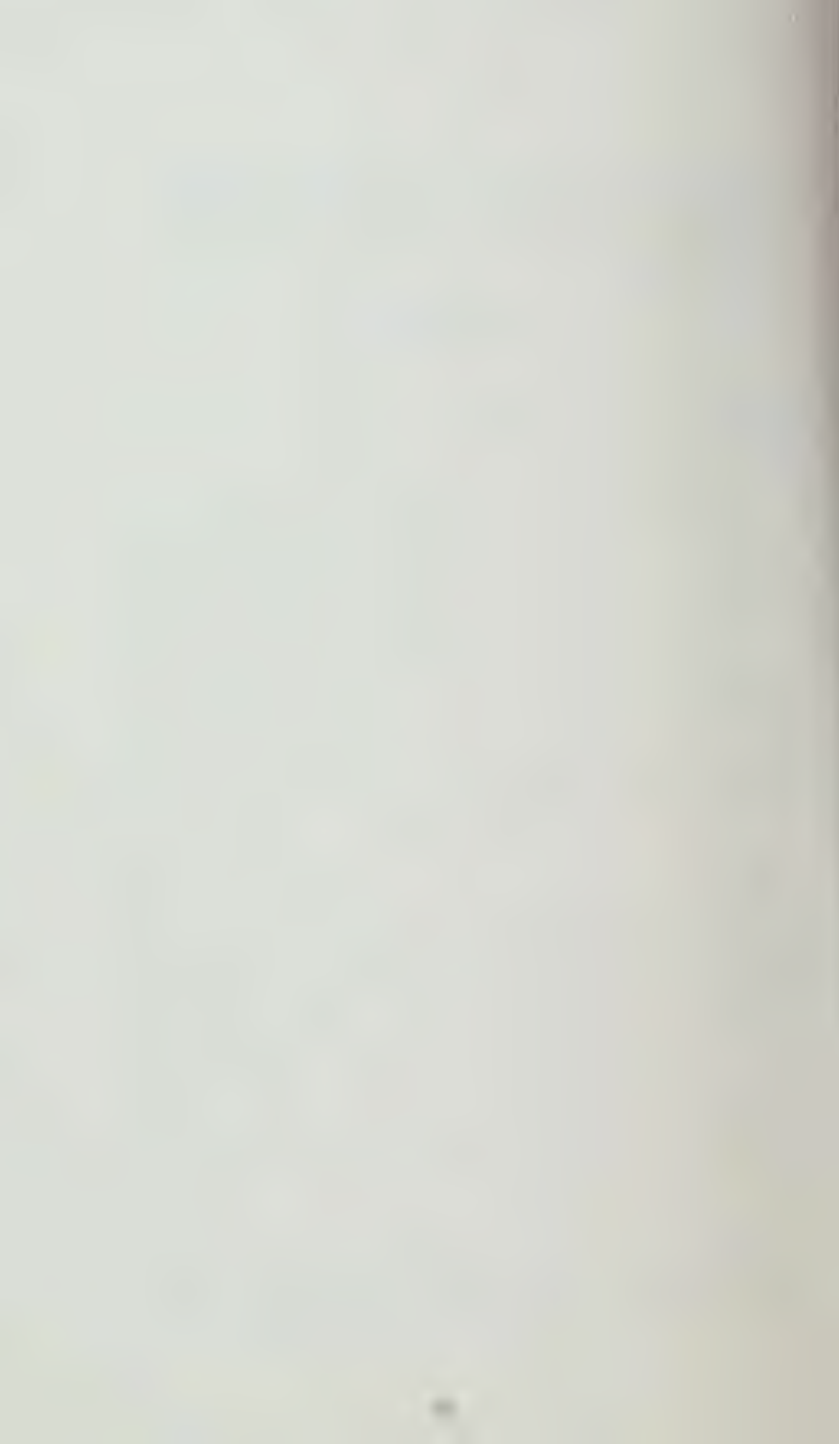
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## **Certification**

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Charles Luedke





FEB 14 1967

IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

No. 20440

ASSINIBOINE AND SIOUX TRIBES, *Appellants*,

*v.*

R. E. NORDWICK, ET AL., *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MONTANA

**REPLY BRIEF**

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**FILED**

APR 22 1966

WM. B. LUCK, CLERK



# INDEX

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IN THE  
**United States Court of Appeals**

FOR THE NINTH CIRCUIT

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**No. 20440**

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ASSINIBOINE AND SIOUX TRIBES, *Appellants*,

*v.*

R. E. NORDWICK, ET AL., *Appellees*.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MONTANA

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**REPLY BRIEF**

This is the position of the Tribes:

1. At the time of the 1927 Act the United States owned the oil and gas in trust for the Tribes. (Tribes' Br. 2-3.) <sup>1</sup>

2. In the 1927 Act, the United States specifically reserved the oil and gas in "undisposed of" lands to the Tribes. There was no savings clause for entrymen. (See Tribes' Br. 14, fn. 3.)

3. At the time of the 1927 Act, the only lands disposed of were those where the entryman had fulfilled all statutory requirements and had thus earned his right to the

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<sup>1</sup> The Tribes' opening brief will be cited throughout as "(Tribes' Br. )."

title. Until the entryman earned the right to title, he had no rights, as against the United States, either to the surface or to the oil and gas. (See *infra*, p. 4, fn. 3.)

4. It was in this frame of reference that Congress reserved to the Tribes their own oil and gas for leasing, rather than continue complete alienation under the homestead laws. The entryman had no right whatsoever in the oil and gas before the 1927 Act and received none by virtue of that Act. Language reserving oil and gas to the Tribes is not language conferring rights in oil and gas on entrymen.

5. The court below has held that the 1927 Act did reserve the oil and gas for the Tribes in lands entered before, but not after that Act. This decision necessarily reads into the 1927 Act an intent by Congress to reserve only part of the Tribes' oil and gas for leasing (i.e., post-1927 Act entries) and to confer the remainder of the Tribes' oil and gas on such pre-1927 Act entries as might, at some future date earn the right to title. Nothing in the language, legislative history, or administrative construction, supports this distinction between pre- and post-1927 Act entries.

The appellees undertake to establish that in the 1927 Act Congress did intend to distinguish between pre-1927 and post-1927 Act entries, did intend to divest the Tribes of their oil and gas, and did confer the oil and gas on the pre-1927 entryman, if and when he earned title.

Appellees do not point to any language in the 1927 Act or any legislative history to support their position. They avoid dealing with the 1927 Act as an Indian statute. They endeavor to escape the public land law definition of the critical phrase "undisposed of" as meaning divestiture of title. They seek to import the meaning of "undisposed of", as used in other statutes where Congress was not exercising its power to withdraw land under entry from public land disposition.

We deal with appellees' arguments following the order of the appellees' brief.

## I

A. We agree with the appellees that the prime question is the meaning of the words "undisposed of" in the 1927 Act and that the intent of Congress controls. We say that the 1908 Act and its 1927 amendment are Indian statutes to be construed favorably to the Tribes in accordance with the standards controlling the interpretation of such statutes. (Tribes' Br. 15-17.) The appellees make no answer to this.

B. The appellees offer no reason for construing the 1927 Act to divest the Tribes of part of their oil and gas. They suggest no reason why Congress should be charged with donating tribal oil and gas to entrymen, who had merely declared their intent to acquire title but had not fulfilled the conditions giving them the right to title and who had no rights in the lands as against the United States (*infra*, p. 4, fn. 3). Appellees advance no reason why the 1927 Act should be construed to charge Congress with conferring less protection on lands held by the United States in trust, than to the Government's own lands.<sup>2</sup> (Tribes' Br. 11-12.)

It would take unmistakeably clear language to divest the Tribes of their oil and gas in favor of incipient entries, when Congress was pursuing the opposite policy with lands of the United States. There is no such language. The

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<sup>2</sup> The Mineral Leasing Act of 1920, governing lands owned by the United States, specifies that "Deposits of \* \* \* oil \* \* \* or gas, and lands containing such deposits owned by the United States, \* \* \* shall be subject to disposition" by leasing. (30 U.S.C. 181.) Minerals on public land under entry became subject to leasing as lands owned by the United States. It took affirmative statutory language to give pre-1920 Act entrymen any relief, and that was by way of a preferential right to lease, not a grant of title. (Section 20 of the Mineral Leasing Act (30 U.S.C. 229).) *Skeen v. Lynch*, 48 F.2d 1044, 1047 (C.A. 10, 1931) certiorari denied 284 U.S. 633; *Charles R. Haupt*, 47 L.D. 588, 589 (1920).



words "undisposed of" are not words to carry out such an intent. On the contrary, they are words of broad scope affirmatively establishing that oil and gas owned by the Tribes on the date of the 1927 Act, were specifically reserved to the Tribes.

C. When Congress directed that the Tribes' lands be "disposed of" in Section 7 of the 1908 Act, it used those words to mean complete alienation. And in Section 8, Congress spelled out the point at which there was complete alienation—when the entryman satisfied all requirements of settlement, improvement and payment entitling him to a patent. (Tribes' Br. 3, 10, 38. ) This meaning of "undisposed of" did not change when Congress used the phrase in the 1927 amendment "specifically reserving" oil and gas in tribal lands. It meant, where title had not yet been earned.

The words "disposed of" and "undisposed of" in Section 7 of the 1908 Act and in the 1927 Act, were simply expressive of an ancient rule of public land law—that an entryman acquires no rights against the Government until he has fulfilled the conditions required by the law,<sup>3</sup> and, until that is done, Congress is free to withdraw the land from sale or to grant it to other parties. As noted by the Supreme Court, an entryman is one who has taken the

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<sup>3</sup> In 1870 the Supreme Court characterized this as the "recognized rule of action in that [Land] department." *Frisbie v. Whitney*, 9 Wall. 187, 195-196 (1870). The Supreme Court repeatedly reiterated and explicitly reconfirmed the rule. *Hutchings v. Low* (Yosemite Valley cases), 15 Wall. 77, 86-88 (1872); *Campbell v. Wade*, 132 U.S. 34, 37-38 (1889); *Whitney v. Taylor*, 158 U.S. 85, 95 (1895). In the last named case, the Court stated that a homestead entry "practically amounts to nothing more than a declaration of intention." To the same effect, see *Russian-American Packing Co. v. United States*, 199 U.S. 570, 577-578 (1905); *Payne v. Central Pacific R. Co.*, 255 U.S. 228, 234-235 (1921). Also, see Tribes' Br. 17-19. The homestead entryman has no right to remove timber from an unperfected entry beyond that necessary for cultivation or improvement, *Shiver v. United States*, 159 U.S. 491, 497-498 (1895); or to remove sand and gravel, *Litch v. Scott*, 40 L.D. 467, 469 (1912). Certainly he had no right to the oil and gas.

*initial* steps to obtain title by *future* compliance with the law. Until there is compliance with the law (sec. 8 of the 1908 Act), he has no title. *Payne v. Central Pacific R. Co.*, 255 U.S. 228, 234-235 (1921); also cases cited in footnote 3, *supra*. On the date of the 1927 Act, Nordwick had taken only the initial steps. He did not earn title until 1935.

D. The appellees do not wish the Court to apply public land law. This is understandable. As noted, under public land law, where Congress is withdrawing lands or granting them to another, the words "undisposed of" mean a divestiture of title—a complete alienation. Appellees do not deny this. They would avoid it by saying "We are not concerned with public land concepts \* \* \*." (Appellees' Br. 6.) But once the Tribes' trust lands were classified and appraised, public land law governed. Section 7 of the 1908 Act specified that the Tribes' lands "shall be disposed of under the general provisions of the homestead, desert-land, mineral and townsite laws of the United States, \* \* \*." Section 8 explicitly required the entryman to comply "with all the requirements of the homestead law \* \* \*" as one of the requisites to earning title. (Tribes' Br. 3, 36, 38.) Those are public land laws administered by the General Land Office, later the Bureau of Land Management. They controlled the rights of entrymen, including Nordwick. The point at which the Tribes' lands were "disposed of" under the homestead, desert-land, mineral and townsite laws must be tested by public land law concepts. Appellees cannot escape this.

E. Appellees are silent on the point that the 1908 Act and the 1927 Act are Indian statutes and must be construed as Indian statutes so far as the Tribes' rights are concerned. (Tribes' Br. 15-17.) Appellees are driven to advise the Court to forget about Indian law and public land law and to interpret the 1927 Act on the basis of how "disposed of" or "undisposed of" was used in cases involving commercial contracts, wills, tax statutes and the like. (Appellees' Br. 5.)

## II

A. Appellees advance the argument that the use of the words "undisposed of" in Section 11 of the 1908 Act, establishes that the same phrase did not mean divestiture of title when used in a totally different context nineteen years later in the 1927 Act. (Appellees' Br. 8-9.) Legislation cannot correctly be construed in this fashion. Words must be read and interpreted in the context of the objective Congress sought to accomplish. *Securities & Exch. Com. v. Joiner Leasing Corp.*, 320 U.S. 344, 350-351 (1943). They are not mechanically transferable from one statute to another, or between sections of the same statute.

Section 11 of the 1908 Act, unlike the 1927 Act, was designed for the sale of land, not the withdrawal of land from sale. Section 11 used both "undisposed of" and "unsold" in the same sentence and treated both as meaning "unsold." In the same sentence, Section 11 specified that lands "undisposed of" at the end of five years were to be "sold" to the highest bidder with a minimum price of \$1.25 per acre, while lands "unsold" at the end of ten years were to be "sold" to the highest bidder, without any minimum. Read in context with the purpose of Section 11, it is plain that "undisposed of" for five-year lands and "unsold" for ten-year lands were used synonymously. Congress was dealing with unsold lands in both instances. This was the administrative construction announced in 1918. *Lands Within Former Fort Peck Reservation*, 46 L.D. 380 (1918). (Appellees' Br. 9-11.)

The objective of the 1927 Act was completely foreign to that of Section 11 of the 1908 Act. The 1927 Act was designed to retain the tribal oil and gas for disposal by lease. In the 1927 Act, the United States was simply extending to trust land, the same leasing policy it had adopted for its own public land through the Mineral Leasing Act of 1920. (Tribes' Br. 11-12; *supra*, fn. 2.)

The phrase "undisposed of" must be tested against this

background, coupled with the fact that the oil and gas was trust property belonging to the Tribes on the date of the 1927 Act. So tested, there is nothing to support the view that Congress used the phrase "undisposed of" in the 1927 Act as a means of reserving part of the Tribes' oil and gas for leasing (post-1927 Act entries) and of donating the rest of the Tribes' oil and gas to those pre-1927 Act entrymen, who at some future date might earn the right to title. (Tribes' Br. 24-27.)

B. In the same tenor, appellees refer to the phrases "undisposed of" and "disposed of" in two other statutes, one the Appropriation Act of August 1, 1914, c. 222, sec. 9, 38 Stat. 582, the other, the Act of February 27, 1917, c. 133, 39 Stat. 944, 30 U.S.C. 86-89. (Appellees' Br. 11-13.) Both deal with the disposition of land, not with the power to withdraw land from disposition exercised in the 1927 Act.

The 1914 Act permitted allotments to Fort Peck Indians from "undisposed of" "surplus" lands. Again, in context with the legislative scheme, it would be irrational to say Congress intended to dispossess entrymen in order to permit Indians to select from lands under entry. But that meaning of "undisposed of" cannot be imported into the 1927 Act, designed to remove the Tribes' own oil and gas from disposition except by leasing. The reservation of oil and gas for leasing, did not and could not create any conflicts, or in any manner affect any rights of the entryman, possessory or otherwise. (See Tribes' Br. 27.)

C. The 1917 Act invoked by appellees simply has no application. (Appellees' Br. 12-13.) The 1917 Act was a statute of general application permitting "surplus" Indian land which was classified as coal, and not otherwise "disposed of," to be opened to agricultural entry with the coal reserved to the United States. The administrative construction on which appellees rely did not turn on the meaning of "disposed of" but on the familiar principle of statutory construction that a special statute (1908 Act for Fort



Peck) controls over a general statute (1917 Act for all Indian reservations). (See Tribes' Br. 27-28.)

D. The appellees refer to the legislative history of the 1927 Act. (Appellees' Br. 13-14.) Appellees would make much of the change from "not disposed of" in the bill as introduced, to "undisposed of" in the bill as enacted into law. The change had no significance whatsoever. Nothing in the legislative history lends credence to appellees' suggestion that the change was deliberately made to insure that "undisposed of" in the 1927 Act would have the same meaning as "undisposed of" in the sale provisions of Section 11 of the 1908 Act, or in the allotment provisions of the 1914 Appropriation Act.

The important thing is that, as confirmed by legislative history, the dominating purpose of the 1927 Act was to halt alienation, except by lease, of the oil and gas interests owned by the Tribes. (Tribes' Br. 11-15.) And on the date of the 1927 Act the Tribes owned the oil and gas in all land under entry where the entryman had not earned the right to title. This includes the land in suit. (*Supra*, p. 4, fn. 3.)

E. Appellees overstate the instructions contained in a letter of January 18, 1929, from the Commissioner of the General Land Office to the local register. Appellees erroneously recite that the "letter states that the reservation of oil and gas provided by the 1927 Act is to be effective to *only* future applications for homestead entries on Fort Peck lands." (Emphasis supplied.) (Appellees' Br. 14.)

The Commissioner's letter is set out in *Circulars and Regulations of the General Land Office*, pp. 715-716 (GPO 1930). From the text of the letter it appears that instructions had earlier been issued "requiring that all homestead entries embracing Fort Peck lands be made subject to the provisions" of the 1927 Act, but that the local register had not received those instructions. Accordingly, the 1929 letter instructed the register that: "In the future in *all*

applications for homestead entries of Fort Peck lands or *applications for reinstatement of cancelled entries of such lands*, you will require the applicant to file a consent to the reservation of the oil and gas to the Fort Peck Indians \* \* \*.” (Emphasis supplied.)

The instructions related to prospective applications. They did not, as appellees advise the Court, say that the 1927 reservation was to be effective “*only*” as to future applications. The instructions directed the register to require that applicants for entry who filed after the 1927 Act, consent to a reservation of oil and gas to the Tribes. The instructions also meant that the same consent was to be obtained when post-1927 Act applications were made for reinstatement of a cancelled entry.

The appellees read too much into the letter of instruction. And the same is true of the *obiter dictum* in 53 I.D. 544 (quoted by the appellees (Br. 14)), uttered by Interior’s Solicitor to bolster his opinion in support of an Indian allotment. The instructions were dealing with applications for homestead entries *in futuro*. The substantive question of whether oil and gas were included or excluded from past entries was not present. There was no occasion to instruct with respect to such entries. In these circumstances, there is no warrant for treating the 1929 letter as administrative recognition of title to the oil and gas in pre-1927 Act unperfected entries.

If the appellees’ analysis of the 1929 instructions were right, all pre-1927 entrymen would have been given the oil and gas. We know this was not done. The case at bar is an instance in point. Nordwick’s patent reserved the oil and gas to the Tribes (Pl. Ex. 53). That was the administrative construction and practice. Significantly, the court below makes no reference to the 1929 letter.

F. Similarly, appellees read too much into the letter of March 29, 1930 from the General Land Office (Ex. 64) advising the register and receiver of the local land office to

note on the final certificate that oil and gas in the 80 acres adjudicated below was reserved to the Tribes. (Appellee's Br. 2, 14-15.)<sup>4</sup> The letter is silent as to a similar reservation for the 160 acres in suit. Appellees overstate the contents of the letter and convey the erroneous impression that the letter affirmatively instructed that oil and gas "was to be reserved *only* as to the additional entry [80 acres] and not the 160 acres concerned in the appeal." (Emphasis supplied.) (Appellees' Br. 14-15.)

The ultimate fact is that the final certificate and patent did reserve the oil and gas. The patent, the conclusive instrument of title, was issued in Washington where policy and administrative construction are established (Ex. 53). There is no warrant for appellees' assertion that the reservation of oil and gas in the final certificate and patent, came about "through clerical error." (Appellees' Br. 15.) There is no basis for contending the patent did not reflect the administrative position. Indeed, Nordwick was satisfied and made no complaint until after twenty years, when the land appeared to be valuable for oil and gas. (Tribes' Br. 4, 34-35.)

G. Appellees advance the allotment cases as evidencing that "undisposed of" means land not subject to entry. (Appellees' Br. 15.) Those cases establish the opposite. (Tribes' Br. 28-32.) They stand for the proposition that one who wishes to obtain title to federal land, must fulfill all the requisites of the law before the right to title vests in him. (See *supra*, p. 4, fn. 3.)

Each allotment case presented the question of whether the oil and gas passed to the allottee, or was reserved to the Tribes, under the 1927 Act. The answers depended on whether the land was "undisposed of" on the effective date of the allotment. Here the difference between a public

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<sup>4</sup> Appellees complain that the Tribes omitted reference to this letter in their opening statement (Appellees' Br. 2). But appellees fail to note that the letter was quoted and discussed where it fitted into the Tribes' argument. (Tribes' Br. 21.)



land entry and an allotment comes into play. An entry is the initial step of one who wishes to obtain the title to public land by future compliance with the law. Upon full compliance with the law, the entryman earns the right to title. Between the initial and concluding steps, the land is undisposed of and subject to Congressional withdrawal or grant to another. (See *supra*, p. 4, fn. 3.)

In the case of an allotment, the land is disposed of when an Indian makes his selection in the field and the selection is recorded on the allotment schedule. At that point the Indian has done all required of him and the right to title to the allotment is vested in him. In appellees' words, it is the equivalent of the "homestead entryman who has made full payment and final proof." (See Tribes' Br. 30, fn. 6.)

The Secretary applied this principle to the allotment cases. An allotment of irrigable land selected and approved *before* the 1927 Act, carried the oil and gas with it. An allotment of grazing land selected and approved *after* the 1927 Act was subject to oil and gas in the Tribes. *Raymond Bear Hill*, 52 L.D. 688 (1929). (Tribes' Br. 28-29.) An allotment selected and recorded on the allotment schedule *before* the 1927 Act, carried the oil and gas with it even though the schedule was approved after the 1927 Act. 53 I.D. 538, 544. (Tribes' Br. 30-31.)

In short, oil and gas did not pass until the Indian had done all required of him by law to receive title to the allotment. The equivalent in the case of an entryman is spelled out in Section 8 of the 1908 Act (Tribes' Br. 38): " \* \* \* and when an entryman shall have complied with all the requirements of the homestead law and shall have submitted final proof \* \* \* and shall have made all required payments aforesaid, he shall be entitled to a patent for the lands entered: \* \* \*." Nordwick did not comply with those requirements until 1935,—eight years after the 1927 Act removed the oil and gas from disposition, except by leasing.

H. We take no issue with the rules of law governing the weight to be given the administrative construction of a statute. (Appellees' Br. 15-16.) But, administrative construction supports the Tribes' not appellees', position. In this case, the Land Office *contemporaneously* construed the 1927 Act to reserve the oil and gas to the Tribes. The Land Office title report on the land in suit, the final certificate and the patent all reserved oil and gas to the Tribes. (Tribes' Br. 20-21.) There is nothing to indicate this was the exception and not the rule.

In 1956, the Assistant Solicitor, Department of the Interior, expressed the Department's position, namely that the land in suit was undisposed of on the date of the Act. The Bureau of Land Management in the *ex parte* proceeding, issued Nordwick a supplemental patent to the oil and gas, in violation of the advice of the Assistant Solicitor acting in the exercise of power delegated by the Secretary of the Interior. The motivation for this singularly unbecomable action by a subordinate Bureau of the Department remains inexplicable. Certainly, this action could not have been accomplished except *ex parte*. If the Tribes had been parties to the proceedings, an appeal to the Secretary would have exposed the Bureau's action. Nordwick was the moving party in that *ex parte* decision. Yet, the appellees are silent on the matter, just as they are silent on the administrative position expressed in the Assistant Solicitor's 1956 memorandum opinion. (See Tribes' Br. 21-22.)

### III

The appellees undertake to raise a false alarm by asserting, without any proof whatsoever, that a large quantity of other lands may be affected. (Appellees' Br. 16-17.) The same contention was rejected below when made with respect to the 80 acres entered after the 1927 Act. This is not a ground for divesting the Tribes of their property.

Mr. Nordwick was an agricultural entryman. He took title in 1935 subject to oil and gas in the Tribes. He made no complaint or protest until after the land was deemed valuable for oil and gas, some twenty years later. Through the inexplicable *ex parte* proceedings, an exception violating established law, was unlawfully carved out for him. (Tribes' Br. 4-6, 33-35.)

Common sense dictates there is no substance to appellees' assertion of "widespread affect". First, where the entryman earned his right to title prior to the 1927 Act, oil and gas were not reserved to the Tribes. The land was first opened to entry on May 1, 1914, Presidential Proclamation of July 25, 1913, 38 Stat. 1952. It seems fair to assume that title to most of the land was earned in the thirteen years between May 1, 1914 and the 1927 Act.

Second, a large number of entries were made under the Stock-Raising Homestead Act of December 29, 1916, c. 9, 30 Stat. 862, as amended, 43 U.S.C. 291 et seq. Under Section 9 of that Act (43 U.S.C. 299), all minerals were reserved to the United States. Entrymen under that Act could not get title to the Tribes' oil and gas, even if there had been no 1927 Act. *Skeen v. Lynch*, 48 F.2d 1044 (C.A. 10, 1931), certiorari denied 284 U.S. 633; *Devearl W. Diamond*, 62 I.D. 260, 261-262 (1955). Since the United States was acting as trustee for the Tribes, minerals in stock-raising homesteads were held for the benefit of the Tribes. *Ownership of Minerals—Patented Indian Lands*, 59 I.D. 393, 395 (1947); *B. Leslie Zaerr*, Montana 014651 (September 3, 1957) (Gower Federal Service, BLM-1957-126.)<sup>5</sup>

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<sup>5</sup> All surplus lands at Fort Peck were withdrawn from all forms of sale or disposal by Secretarial order of September 19, 1934. *Restoration of Lands Formerly Indian to Tribal Ownership*, 54 I.D. 559, 563 (1934); *B. Leslie Zaerr*, Montana 014651, (September 3, 1957) (Gower Federal Service, BLM-1957-126).

Since Gower's Service may not be available to the Court, excerpts from the opinion in the *Zaerr* case are set out in the Appendix, p. 15, and three copies of the opinion are being lodged with the clerk. The decision also evidences the clear understanding of the Bureau of Land Management of the nature of the Tribes' interest in the oil and gas.

Without a complete examination of the title to all Fort Peck lands there is no way of saying with certainty that there are no other instances where oil and gas should have been, but were not, reserved to the Tribes. Following Mr. Nordwick's *ex parte* success in obtaining a supplemental patent for the oil and gas in 1955, at least one other application was filed similarly seeking the oil and gas in a homestead entry. *Karge*, GF 074447. That application is being held in suspense by the Department of the Interior pending the final outcome of this case. The undersigned has made inquiry of the Bureau of Land Management and has been advised that the *Karge* application is the only one on file.

### Conclusion

That part of the judgment below, here on appeal, should be reversed with instructions as noted in the conclusion of our opening brief.

Respectfully submitted,

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April 1966.

### Certification

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARVIN J. SONOSKY.

## APPENDIX

EXCERPT FROM DECISION OF THE BUREAU OF LAND  
MANAGEMENT**B. Leslie Zaerr—Montana 014651—September 3, 1957**

## Manager's Decision Affirmed

Mr. B. Leslie Zaerr has appealed to the Director of the Bureau of Land Management from a decision of the Acting Manager of the Billings, Montana, Land Office. In that decision, dated June 13, 1955, Mr. Zaerr's offer to lease for oil and gas was rejected because the land is withdrawn by the order of September 19, 1934 and is in the Fort Peck Indian Reservation.

This land was originally a part of the surplus lands of the Fort Peck Indian Reservation, and was made subject to disposal under the general provisions of the homestead, desert land, mineral and town-site laws of the United States by the Act of May 30, 1908 (35 Stat. 558). Until disposed of according to law, the land remained the property of the Indians. *Ash Sheep Company v. United States*, 252 U.S. 159 (1920). When sold, the proceeds of the sale were required to be deposited to the Treasury to the credit of the Indian Tribe. It was the intention of this statute that the United States should act as trustee for the Indians. The equitable title to the land was therefore vested in the Indians, subject to the trusteeship of the United States.

The particular tract embraced within the appellant's offer to lease was patented pursuant to the Stockraising Homestead Act of December 29, 1916, 43 U.S.C., 1952 ed., secs. 291-301. The patent reserved to the United States the minerals in the land, together with the right to prospect for, mine, and remove the minerals.

The appellant contends that the land ceased to be within the Fort Peck Indian Reservation at the time it was patented, and that the reservation of minerals was not for the benefit of the tribe, but for the benefit of the United States, which can, therefore, dispose of the minerals in accordance with the applicable laws.



The Act of May 30, 1908, *supra*, contains no indication of an intent to extinguish the interest of the Indians in the mineral estate. On the contrary, section 12 of the Act provides that the surplus lands of the Fort Peck Reservation shall be subject to exploration, location and purchase under the general provisions of the United States mineral and coal land laws, and section 13 provides that the United States shall act as trustee for the Indians, and pay over to them the proceeds received from the sale of the land.

It is therefore clear that Congress intended the United States to hold the title to the surface and to the underlying minerals in trust for the Indians. Since the beneficial interest of the Indians could be terminated only by or under authority of the Congress, the reservation of minerals to the United States contained in the patent issued under the Stockraising Homestead Act, *supra*, must be regarded as inuring to the benefit of the Indians. *Cf. Margaret Stepp*, 60 I. D. 174 (1948). In other words, legal title to the minerals underlying the patented land remained in the United States, and the beneficial title remained in the Indians. *Cf. Ownership of Minerals in Patented Lands Within the Uintah and Ouray Indian Reservation*, Utah, 59 I. D. 393 (1947).

The Mineral Leasing Act of 1920, pursuant to which the present application was filed, authorizes the issuance of oil and gas leases on "lands \* \* \* owned by the United States." (30 U. S. C. 1952 ed., sec. 181.) \* \* \* The land here involved is thus not land "owned by the United States," since any proceeds derived from the lease of the minerals must be deposited to the credit of the Indians of the Fort Peck Reservation. The Mineral Leasing Act of February 25, 1920, is therefore not applicable to the land embraced within the appellant's offer to lease, and the offer was properly rejected.

The surplus lands of the Fort Peck Indian Reservation were temporarily withdrawn from all forms of sale, disposal or leasing by order of the Secretary dated September 19, 1934. (54 I. D. 559, 563.) The purpose of the withdrawal was to enable the Bureau of Indian Affairs to give appropriate consideration to the matter of permanent restoration of the lands to tribal ownership, as provided by the Act of June 18, 1934, 25 U. S. C., 1952 ed., sec. 461 *et seq.*

By its terms, the withdrawal was to apply to "lands the proceeds of which, if sold, would be deposited in the Treasury of the United States for the benefit of the Indians." Since the Indians were the beneficial owners of the minerals reserved to the United States in patents issued pursuant to the Stockraising Homestead Act, *supra*, the withdrawal was effective as to those mineral rights, also. *Cf. Solicitor's Opinion*, M-36142 (October 29, 1952).

\* \* \* \* \*

(8118-2)





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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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ASSINIBOINE AND SIOUX TRIBES, Appellants

v.

R.E. NORDWICK, ET AL., Appellees

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA

---

MEMORANDUM FOR THE UNITED STATES

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EDWIN L. WEISL, JR.,  
Assistant Attorney General.

ROGER P. MARQUIS,  
Attorney, Department of Justice,  
Washington, D. C., 20530.

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FILED

AUG 18 1966

AM B LUCK, CLERK



IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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No. 20440

ASSINIBOINE AND SIOUX TRIBES, Appellants

v.

R. E. NORDWICK, ET AL., Appellees

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA

---

MEMORANDUM FOR THE UNITED STATES

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This memorandum is filed in response to the Court's  
r of July 7, 1966, requesting the views of the United  
es with respect to the proper construction of the Act of  
h 3, 1927, 44 Stat. 1401, as applied to the facts of this

The issue is the rights to oil and gas in the tract  
and granted to Nordwick, appellees' predecessor in title.  
land was formerly part of the Fort Peck Indian Reservation  
ontana beneficially owned by the Assiniboine and Sioux  
es. That grant was made in 1935 under the homestead laws.

The original application to enter under the homestead laws was filed on January 24, 1925. Final proof of compliance was filed in 1929, and final payment was made in 1935 when the final certificate was approved and patent issued.<sup>1/</sup> The Act of March 1927, 44 Stat. 1401, reserved "the oil and gas in the tribal lands undisposed of on the date of approval of this Act" to the Indians having tribal rights on said reservation. Rejecting the claim of the plaintiff tribes, the district court held that this land had been disposed of within the meaning of the 1927 Act at the date it was passed and, hence, the mineral reservation was improper.

It is the view of the United States that this ruling<sup>2/</sup> was erroneous. By memorandum of March 23, 1956, the Assistant Solicitor, Branch of Minerals of the Department of the Interior advised the Bureau of Land Management that this land was "undisposed of" when the Act of March 23, 1927, became law (Plaintiff Exhibit No. 61). Citations were given to the effect that "disposal" means alienation of title. The Department of the Interior

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<sup>1/</sup> The original patent specifically reserved the minerals. However, that reservation was eliminated in a supplemental patent issued May 9, 1956.

<sup>2/</sup> We express a view only as to the issue here presented, i.e., the meaning of the 1927 Act. Of course, other issues as to the rights between the United States and the Indians, for example as to when liability occurs for the purposes of the Indian Claims Commission Act, present different problems and different considerations.

heres to this view (see letter attached as Appendix A), and  
s Department concurs. A recent application of the principle  
t a statute "must be liberally construed in favor of the  
inole Tribe and all doubtful expressions therein resolved  
favor of the Seminole Tribe" is Maryland Cas. Co. v. Citizens  
'1 Bank (C.A. 5, No. 21992, May 13, 1966), printed in Appen-  
t B. infra.

No reason appears why Congress should be considered  
have exercised less than all of the authority it possessed  
reserve minerals for the Indian Tribes.

Respectfully submitted,

EDWIN L. WEISL, JR.,  
Assistant Attorney General.

ROGER P. MARQUIS,  
Attorney, Department of Justice,  
Washington, D. C., 20530.

AUGUST 1966







UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240

Your reference:

RPM:SBH

90-2-0-609

Hon. Edwin L. Weisl, Jr.  
Assistant Attorney General  
Land & Natural Resources Division  
Department of Justice  
Washington, D. C. 20530

JUL 27 1966

Dear Mr. Weisl:

This replies to your letter of July 12, 1966, concerning Assiniboine and Sioux Tribes, et al. v. R. E. Nordwick, et al., No. 20,440, in the Court of Appeals for the Ninth Circuit, which requested our views on the proper construction of the Act of March 3, 1927, 44 Stat. 1401.

The question before the court is whether surplus Fort Peck tribal land which was the subject of a homestead entry under the Act of May 20, 1908, 35 Stat. 558, which entry was unperfected when the Act of March 3, 1927 became effective, was undisposed of within the meaning of the 1927 Act so that oil and gas underlying it was reserved for the benefit of the Indian tribes. A supplemental patent for the oil and gas underlying appellees' homestead was granted, notwithstanding two opinions of the Solicitor's Office that such patent should not issue. We are of the view that these opinions were correct.

We think that surplus tribal land upon which an unperfected homestead entry had been made were "undisposed of" within the meaning of section 1 of the 1927 Act. The memorandum opinion of the Assistant Solicitor, Branch of Minerals, dated March 23, 1956, a copy of which is enclosed, properly concludes that under the public land laws "disposal" means the alienation of title and that anything less does not amount to "disposal" within the meaning of the 1927 Act as applied to the circumstances of this case.

The published decisions of this Department over the past sixty years have time and again stated the position that lands entered under the homestead laws and similar laws may be withdrawn by the United States for any of several purposes before all requirements leading to the issuance of a patent have been satisfied. Similarly, before an entry has been perfected by performance of the entrymen of all that he is required to do for a patent, the United States may reserve unto itself the mineral rights therein or require a waiver of the same under pain

of cancellation of the entry. See Mary C. Sands, 34 L.D. 653 (1966); Instructions, 43 L.D. 294 (1914); Cleveland Johnson (On Rehearing), 48 L.D. 18 (1921); Columbus C. Mabry (On Rehearing), 48 L.D. 280, (1921); Leo O. LaFlame, 49 L.D. 324 (1922); Arsene J. Martin, 49 I.D. 608 (1923); Jacob Terrell, 49 I.D. 671 (1923).

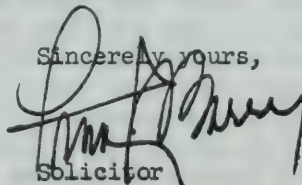
Moreover, it appears that neither party disputes that the United States could have reserved the oil and gas in the subject land. Appellees, however, contend that Congress did not intend to so reserve the minerals and that therefore they are not reserved where entry was made prior to the effective date of the 1927 Act.

The best argument which we find in support of the appellees' position is that based on the effect given by this Department to allotment selections made by Fort Peck Indians before the effective date of the 1927 Act. This Department held that a Fort Peck Indian is entitled to an allotment free of the oil and gas reservation provided by the 1927 Act, even though his selection, made before the effective date of the 1927 Act, had not received departmental approval until after the Act became effective. See Raymond Bear Hill, 52 I.D. 688 (1929). But the difference between an allotment selection and an entry as regards its effecting a disposition of Fort Peck tribal lands is quite clear. The Indian, after making his selection, need do nothing further to perfect his right to an allotment from the common property of his tribe. The homestead entryman, on the other hand, does not become entitled to a grant of the land, as does an Indian who has selected an allotment, until he has submitted final proof.

Therefore, the allotment selection cases merely confirm our view that Congress in passing the 1927 Act intended to secure to the Indians having tribal rights on the Fort Peck Reservation the oil and gas interests in surplus tribal lands in which on the effective date the 1927 Act no rights adverse to the Indians had been perfected. Finally, if there is any doubt as to this being what Congress intended by the use of the words "undisposed of", such doubt, in accordance with the rule of resolving doubtful expressions in Federal legislation in favor of the Indians, must be resolved in favor of the Fort Peck Tribes. Choate v. Trapp, 224 U.S. 665, 675 (1912); United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 354 (1941).

As requested by your letter of July 14, 1966, the copies of the opinion and of appellants' brief and reply brief are enclosed.

Sincerely yours,



Solicitor

Enclosures (4)

March 23, 1956

Memorandum

To: Mr. Lewis Hillman, BLM

From: Assistant Solicitor, Branch of Minerals

Subject: Proposed supplemental patent to Arthur L. Nordwick  
Patent No. 1080633.

I am unable to agree with you that the land in question had been "disposed of" when the act of March 3, 1927 (44 Stat. 1401) was passed or that it was then "disposed of".

The following citations are conclusive of the questions:

The term "disposal" means alienation of title, Arant v. State of Oregon, 2 L. D. 641. The granting of a prospecting permit "not being an act of alienation of property or granting a divestiture of title is not a "disposal" of the land in any proper sense." Sol. Op. September 30, 1921, 48 L. D. 459, 465, citing Arant v. State of Oregon.

"It is that final and irrevocable act by which the rights of a person, purchaser, or grantee, attaches, and the equitable right becomes complete to receive the legal title by a patent or other appropriate mode of transfer. Until that act the land is not disposed of, \* \* \*." State of Oregon et al v. Frakes, 33 L. D. 101, 103.

The courts hold likewise, United States v. Racker, 3 Fed. 292, 294, Mutual Loan & Thrift Co. v. Corn, 188 S.W. 2d 345, 346; Manion v. Peoples Bank of Johnston, 38 N.Y.S. 2d 484, 490; Scott v. State, 64 S. E. 1005, 1006; In re Olson's Estate, 94 N. W. 421, 422. A voluntary parting with anything short of an estate in the land is not a "disposal" of it. In re Hubbell Truat, 113 N. W. 512, 515.



In this connection it is noted that although Nordwick signed a waiver of the oil and gas as to 80 acres only and not as to the remaining 160 acres the patent reserved the oil and gas in all of the 240 acres. To forestall any possible action to issue a patent for the 160 acres free of any reservation, permit me to point out that the Bureau apparently inadvertently complied with the 1927 act as to that 160 acres, and the patent should stand. There is no requirement in the 1927 act that a grantee consent to the reservation. In fact, the act itself reserves the oil and gas in land undisposed of on the date of the act as all of the 240 acres were.

Presumably the Bureau in calling for consent proceeded unnecessarily in the same manner as it customarily-and rightly-proceeded-and proceeds-under the act of July 17, 1914.

The draft decision is returned without endorsement.

Assistant Solicitor  
Branch of Minerals

Attachment

copy to: Mr. Kammerer, Solicitor's Office  
Mr. Larkin, Indian Office  
Secretary's Office  
Docket Section  
Div. of Public Lands Reading Files

CRBradshaw:dvw  
3/23/56

IN THE  
**United States Court of Appeals**  
**FOR THE FIFTH CIRCUIT**

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**No. 21992**

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**MARYLAND CASUALTY COMPANY,**  
**Appellant,**  
**versus**

**CITIZENS NATIONAL BANK OF WEST HOLLYWOOD,**  
**ET AL.,**  
**Appellees.**

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***Appeal from the United States District Court for the  
Southern District of Florida.***

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(May 13, 1966.)

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Before PHILLIPS,\* RIVES and COLEMAN, Circuit  
Judges.

PHILLIPS, Circuit Judge: The question here presented is whether the Seminole Tribe of Florida, Inc.,<sup>1</sup> was immune from an ancillary action in garnishment to satisfy a judgment obtained against it. Seldomridge Construction Company,<sup>2</sup> as prime contractor, entered into a written con-

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\* Of the Tenth Circuit, sitting by designation.

<sup>1</sup> Hereinafter called the Seminole Tribe.

<sup>2</sup> Hereinafter called Seldomridge.

tract with the Seminole Tribe to construct for the latter an office building and an arts and crafts center. Pursuant to the terms of the prime contract, Seldomridge, as principal, and Maryland Casualty Company,<sup>3</sup> as surety, entered into a performance and payment bond with the Seminole Tribe, one condition of which was that Seldomridge would pay for all labor and materials incorporated in the buildings.

Article V of the prime contract, which was incorporated in the bond, in part provided that "before issuance of final certificate, the contractor shall submit evidence satisfactory to the architect that all payrolls, material bills \* \* \* have been paid."

Unit Structures, Inc.,<sup>4</sup> furnished materials to Seldomridge, which were incorporated in the buildings, of the reasonable value of \$14,004.15, for which it had not been paid. The President of Seldomridge represented to the Seminole Tribe that Seldomridge had a damage claim against Unit Structures that would more than satisfy the latter's claim for materials. Thereafter, on September 22, 1960, Seldomridge, by a written contract, agreed to indemnify the Seminole Tribe from any liabilities, loss, damage or expense which it might sustain by reason of any claim made by Unit Structures. Thereafter, the Seminole Tribe paid Seldomridge the final payment due on the construction contract.

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<sup>3</sup> Hereinafter called Maryland.

<sup>4</sup> Hereinafter called Unit Structures.

In the original action brought by Unit Structures, it recovered a judgment against Maryland for \$14,004.15, the amount due on its claim for materials, plus interest, attorneys' fees, and costs, aggregating \$19,482.90, and Maryland, as third party plaintiff, recovered a judgment against the Seminole Tribe for \$17,332.90.<sup>5</sup>

Prior to the execution of the construction contract, the Secretary of the Interior had issued to the Seminole Tribe a charter of incorporation under the provisions of 25 U.S. C.A. § 477, and at all times here material it was a body corporate.

Maryland, after recovering judgment against the Seminole Tribe, caused a writ of garnishment to issue and to be served against the Citizens National Bank of West Hollywood,<sup>6</sup> seeking to recover tribal funds on deposit in such bank to satisfy its judgment.

At the time the writ was served, all of the funds deposited in the Bank to the credit of the Seminole Tribe had been deposited by the United States as a part of a revolving credit fund for the Seminole Tribe, under a deposit agreement that provided:

"The Seminole Tribe of Florida, Inc. hereby assigns, transfers and pledges the aforesaid deposit or deposits, hereby or hereafter made, to the 'United States of America' as security for the repayment of any and all indebtedness for which it

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<sup>5</sup> Judgments were also awarded Maryland against Seldomridge and in favor of the Seminole Tribe against Seldomridge.

<sup>6</sup> Hereinafter called the Bank.



may obligate itself to the United States of America and for the performance of the Corporation's obligations in connection with such indebtedness until such time as deposit or deposits are released, as hereafter provided."

It further provided that "upon written demand of the Superintendent of the Seminole Indian Agency the bank" should "pay over the balance" of the deposit, "or any part thereof demanded, in accordance with the demands."

The United States was not a party to the action, but on June 5, 1964, it filed in the action a document entitled, "Representation of Interest of the United States," in behalf of itself and the Seminole Tribe, in which it set up that the Seminole Tribe received a loan of \$100,000 from the United States from the revolving credit fund maintained by the Bureau of Indian Affairs; that the amount of the loan was deposited in the Bank, pursuant to the terms of the deposit agreement, and an assignment of the deposit to the United States as security for the repayment of the loan; that the agreement also provided for withdrawal of the deposit upon the written demand of the Superintendent of the Seminole Indian Agency; that on May 28, 1964, the Superintendent made a written demand on the Bank for the withdrawal of the balance of such deposit; that the Bank refused to deliver to the Superintendent the entire balance and withheld a sum from such balance to cover the amount of Maryland's judgment against the Seminole Tribe.

The United States asserted in the document in behalf of the Seminole Tribe and itself that the funds on deposit were not subject to garnishment. The Seminole Tribe filed a motion to dismiss the garnishment proceeding.

The court held that under Article VI, Sec. 9 of the Charter, set out *infra*, the funds were immune from garnishment and that the United States had a lien on the deposit, which was prior to the judgment of Maryland, and dismissed the ancillary garnishment proceeding with prejudice. Maryland has appealed.

The paramount authority of the federal government over Indian tribes and Indians is derived from the Constitution, and Congress has the power and the duty to enact legislation for their protection as wards of the United States.<sup>7</sup>

From the beginning of our government, Indian nations or tribes have been regarded as dependent political communities or nations; and as possessing the attributes of sovereignty, except where they have been taken away by Congressional action.<sup>8</sup> They are quasi-sovereign nations.<sup>9</sup>

<sup>7</sup> Williams v. Lee, 358 U.S. 217, 219, n. 4; Perrin v. United States, 232 U.S. 478, 482; United States v. Kagama, 118 U.S. 375; Taylor v. Tayrien, 10 Cir., 51 F.2d 884, 887; Bryan County Okl. v. United States, 10 Cir., 123 F.2d 782, 785.

<sup>8</sup> Choctaw and Chickasaw Nations v. Seitz, 10 Cir., 193 F.2d 456, 458; Cherokee Nation v. Kansas Railway Co., 135 U.S. 641, 653; Native American Church v. Navajo Tribal Council, 10 Cir., 272 F.2d 131, 133; Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res., 8 Cir., 231 F.2d 89, 92.

<sup>9</sup> United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512, 513; Ex parte Reynolds, C.C. Ark., Fed. Cas. No. 11,719; Cf. Cherokee Nation v. State of Georgia, 5 Pet. 1, 7.

Indian nations, as an attribute of their quasi-sovereignty, are immune from suit, either in the federal or state courts, without Congressional authorization.<sup>10</sup>

25 U.S.C.A. § 477, in part here pertinent, provides:

"The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: \* \* \*. Such charter may convey to the incorporated tribe the power to purchase, \* \* \* own, hold, manage, operate, and dispose of property of every description, real and personal, \* \* \* and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, \* \* \*."

The Seminole Tribe was incorporated pursuant to that section. The statute gave no powers to the corporation. It provided that the Secretary of the Interior "may" convey powers to the corporation by the charter; and it is clear that the powers granted to the corporation were only those which the Secretary of the Interior, by the terms of the charter, conveyed to them.

The charter, by Article VI thereof, defined the powers of the corporation. In part here material, it reads:

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<sup>10</sup> *United States v. United States Fidelity & Guaranty Co.*, supra; *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, supra, p. 94; Cf. *Williams v. Lee*, supra; *Haile v. Saunooke*, 4 Cir., 246 F.2d 293, 297; *Colliflower v. Garland*, 9 Cir., 342 F.2d 369, 376.

"Section 1. This tribal corporation, subject to any restrictions contained in the Constitution and the laws of the United States or in the Constitution and Bylaws of the said tribe, shall have the following corporate powers.

\* \* \* \* \*

"Sec. 9. To sue or be sued; but the grant or exercise of such power to sue and to be sued shall not be deemed a consent by the said corporation or the United States to the levy of any judgment, lien or attachment upon the property of the Seminole Tribe of Florida, Inc., other than income or chattels especially pledged or assigned."

The waiver of the immunity to being sued was expressly qualified, and excluded from the waiver was the levy of any judgment, lien or attachment upon the property of the Seminole Tribe of Florida.

Counsel for the appellant urges that garnishment is not specifically named in the exclusionary clause and, therefore, is not excluded. We think there are two answers to that contention.

First, garnishment is closely akin to attachment. It "is directly founded upon the writ of attachment as by custom of London."<sup>11</sup> It is frequently defined as an attachment of goods, credits or effects belonging to the defendant or judg-

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<sup>11</sup> Bouvier's Law Dictionary, Rawle's 3rd Rev., Vol. 1, pp. 1334, 1335.



ment debtor in the hands of a third person.<sup>12</sup> The courts have characterized it as a species of attachment;<sup>13</sup> and in the nature of an attachment<sup>14</sup> or execution.<sup>15</sup>

But even more persuasive is the fact that the qualifying clause was written into Section 9 by the Secretary of the Interior to protect the property of the Seminole Tribe, other than income or chattels especially pledged or assigned; and hence it must be liberally construed in favor of the Seminole Tribe and all doubtful expressions therein resolved in favor of the Seminole Tribe.<sup>16</sup>

The fact that the Seminole Tribe was engaged in an enterprise private or commercial in character, rather than governmental, is not material. It is in such enterprises and transactions that the Indian tribes and the Indians

<sup>12</sup> *Kennedy v. Brent*, 6 Cra. 187, 10 U.S. 106; *Beamer v. Winter*, 41 Kan. 596, 21 P. 1078; *Blaisdell v. Ladd*, 14 N.H. 129; *Berry-Beall Dry Goods Co. v. Adams*, 87 Okl. 291, 211 P. 79; *National Bank of Wilmington & Brandywine v. Furtick*, 2 Marv. (Del.) 35, 42 A. 479, 481; *Posselius v. First National Bank*, 264 Mich. 687, 251 N.W. 429, 430; *J. T. Sinclair Co. v. I. T. Becker Coal Co.*, 263 Mich. 617, 249 N.W. 13, 14.

<sup>13</sup> *Ex parte Cincinnati, S.&M. Ry. Co.*, 78 Ala. 258, 259; *Citizens' National Bank of Godley v. Pollard*, Tex.Civ.App., 31 S.W.2d 508, 510; *Farmers' National Bank v. Tehnison*, 90 Okl. 216, 217 P. 182, 183; *Public Finance Co. v. Jump*, 192 Okl. 368, 136 P.2d 706, 710; *Allen v. Stracener*, 214 Ark. 688, 217 S.W.2d 620, 621; *First National Bank of Duncan v. Wallace*, 191 Okl. 105, 127 P.2d 156, 158; *Posselius v. First National Bank*, *supra*; See also, *National Bank of Wilmington & Brandywine v. Furtick*, *supra*.

<sup>14</sup> *Newport v. Semones*, 39 Tenn. App. 647, 286 S.W.2d 876, 880; *J. T. Sinclair Co. v. I. T. Becker Coal Co.*, *supra*; *Coller v. Sheffield Farms Co.*, 129 Misc. 600, 223 N.Y.S. 305, 310; *Davis Brothers v. Choctaw O. & G.R. Co.*, 73 Ark. 120, 83 S.W. 318, 319; *Central Trust Co. v. Chattanooga R.C.R. Co.*, 6 Cir., 68 F. 685, 687; See also, *Dean v. Opdycke*, 151 Wash. 504, 276 P. 545, 546.

<sup>15</sup> *Davis Brothers v. Choctaw O. & G.R. Co.*, *supra*; *Coller v. Sheffield Farms Co.*, *supra*.

<sup>16</sup> *Squire v. Capoeiman*, 351 U.S. 1, 6, 7; *Haley v. Seaton*, C.A.D.C., 281 F.2d 620, 623; *Arenas v. Preston*, 9 Cir., 181 F.2d

need protection. The history of intercourse between the Indian tribes and Indians with whites demonstrates such need. It is obvious that the President of Seldomridge imposed on the Seminole Tribe when he induced it to pay Seldomridge the unpaid balance on the construction contract, with Unit Structures' claim outstanding. To construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of Congress in not relaxing the immunity, namely, the protection of the interests and property of the tribes and the individual Indians. The Supreme Court has not hesitated to hold the immunity applicable in actions for liabilities arising out of private transactions.<sup>17</sup>

We conclude the Seminole Tribe was immune from the garnishment proceeding. It becomes unnecessary to pass on the claim of the United States to a prior lien on the deposit.

AFFIRMED.

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62: *United States v. Oregon Short Line R. Co.*, 9 Cir., 113 F.2d 212, 214; *Big Eagle v. United States*, Ct. Cl., 300 F.2d 765; *United States v. Gilbertson*, 7 Cir., 111 F.2d 978, 980.

<sup>17</sup> *United States v. United States Fidelity & Guaranty Co.*, *supra*; *Williams v. Lee*, *supra*.





FEB 14 1967

No. 20442 ✓

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**United States Court of Appeals**  
**For the Ninth Circuit**

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ANTHONY G. NOTARAS, *Appellant*,

vs.

F. C. RAMON and JANE DOE RAMON, his wife; ARTHUR DROVETTO and JANE DOE DROVETTO, his wife; DONALD F. HANSON and JANE DOE HANSON, his wife; and DONALD KOBLE and JANE DOE KOBLE, his wife, and the respective marital communities formed by each married defendant, *Respondents*.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

**BRIEF OF APPELLANT**

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WRIGHT, WENDELLS, FROELICH  
& POWER

*Attorneys for Appellant.*

455 Olympic National Life Building  
Seattle, Washington 98104



# United States Court of Appeals

## For the Ninth Circuit

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ANTHONY G. NOTARAS, *Appellant*,

vs.

F. C. RAMON and JANE DOE RAMON, his wife; ARTHUR DROVETTO and JANE DOE DROVETTO, his wife; DONALD F. HANSON and JANE DOE HANSON, his wife; and DONALD KOBLE and JANE DOE KOBLE, his wife, and the respective marital communities formed by each married defendant, *Respondents*.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

### BRIEF OF APPELLANT

---

WRIGHT, WENDELLS, FROELICH  
& POWER

*Attorneys for Appellant.*

455 Olympic National Life Building  
Seattle, Washington 98104

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# United States Court of Appeals

## For the Ninth Circuit

ANTHONY G. NOTARAS, *Appellant*,

vs.

F. C. RAMON and JANE DOE RAMON, his wife; ARTHUR DROVETTO and JANE DOE DROVETTO, his wife; DONALD F. HANSON and JANE DOE HANSON, his wife; and DONALD KOBLE and JANE DOE KOBLE, and the respective marital communities formed by each married defendant, *Respondents*.

No. 20442

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

### BRIEF OF APPELLANT

#### STATEMENT OF PLEADINGS AND FACTS

Federal jurisdiction is invoked through 28 U.S.C. 1343, and 42 U.S.C. 1983. This is a "Civil Rights" case, involving unlawful detention of appellant by the appellees after a rightful (albeit mistaken) arrest, which was in turn based upon erroneous eye-witness identification.

The action commenced with filing a civil complaint in the District Court for Western District of Washington, in December, 1964 (Tr. 1). After the pleadings closed, and a trial date assigned, a pre-trial order was agreed upon by the attorneys in conference (Tr. 9). Although the pre-trial order was not signed until the trial (St. 141), the parties agreed that it should govern,



and the pleadings passed out of consideration.

The case was tried to the court without a jury, and following trial, an oral decision was rendered (St. 143). Thereafter, Findings of Fact and Conclusions of Law were entered by the trial judge (Tr. 15), and Judgment of Dismissal was entered August 2, 1965 (Tr. 21).

Appellate jurisdiction of this honorable court is based upon 28 U.S.C. § 1291.

### **STATEMENT OF THE CASE**

Appellant, a twenty-six year old concrete inspector, temporarily out of work, and supporting his family with two part-time jobs, was arrested by the Seattle police in Seattle, about ten o'clock Monday evening, January 20, 1964 (St. 5-7).

The reason for the arrest was "suspicion of having committed grand larceny." (Tr. 15, Finding of Fact I.)

He was at the time having a glass of beer in a downtown tavern, prior to going to work as a substitute bartender in a nearby tavern (St. 7). The reason for the arrest was identification by a cab driver as having been involved in a suitcase theft from the nearby Greyhound Bus Depot (St. 43).

Appellant was held by the Seattle police in the city jail without charge or bail from the time of his arrest Monday night, until almost noon the following Wednesday, January 22, 1964. These facts are not controverted (Tr. 10-11).

Appellant, upon his eventual release, was charged with two petty misdemeanors, convicted in Seattle Municipal Court, and thereafter acquitted by a jury in King County Superior Court (St. 21; Tr. 10-11).

Exercising his prerogatives as a private citizen, appellant thereafter sued for violation of his civil rights, based upon the detention without charge or bail. Appellant concedes the original arrest to have been rightful, although *post facto*, it appeared to have been entirely mistaken (St. 60, 61).

Appellant was put through at least three police "line-ups" (St. 15). It was not until after appellant spent one night incommunicado in jail that he was informed the reason for being arrested (St. 10).

Appellant's wife finally was told by Detective Moran of her husband's whereabouts on Tuesday (St. 51-52). That evening she was finally able to contact a lawyer who would take her case (St. 31, 35-36). She was without funds, and neither she nor her husband knew any lawyers.

Appellant was visited by his wife in jail on Tuesday, prior to obtaining a lawyer. They underwent the humiliation of visiting through a "little window" with a speaker with a jailer present (St. 36-37). She was required to gain "permission" in order to talk to her husband (St. 32; 36).

As the pre-trial order discloses (Tr. 10), a writ of

habeas corpus was served upon Appellee Ramon, as chief of police, on Wednesday morning, January 22. Either in response thereto, or coincidentally (inferences differ), appellant was formally charged and released on bail very shortly thereafter.

### **SPECIFICATIONS OF ERROR**

The District Court erred in:

1. That portion of Finding of Fact X, reading as follows:

“The investigation and inquiries made by Detective Moran both personally and through the assistance of other police officers, were reasonable, justified and legal in all respect.” (Tr. 18)

2. The entirety of Finding of Fact XII, reading as follows:

“The detention of the plaintiff in the Seattle city jail following his original arrest was for a period of time no greater or longer than was reasonable under the circumstances. The period of time between the original arrest and the charging of the plaintiff with a specific crime being reasonably necessary for the making of a reasonable investigation of all the facts and circumstances involving the larceny of said suitcases and the plaintiff’s participation or lack of participation in said larceny.” (Tr. 19)

3. The entirety of Conclusion of Law III, reading as follows:

“That the detention of the plaintiff in the city jail beyond the hour of his arrest was for a period of time no greater or longer than was reasonable and no greater or longer than was reasonably neces-

sary for the making of a prompt and expeditious investigation of plaintiff's participation or lack of participation in a theft of suitcases from the Greyhound Bus Depot in Seattle, Washington." (Tr. 20)

4. The entirety of Conclusion of Law IV, reading as follows:

"That the conduct of all defendants involved herein as shown by the evidence was valid and legal in all respects and not prohibited by any statute or common law of the State of Washington." (Tr. 20)

5. The entirety of Conclusion of Law V, reading as follows:

"That the plaintiff's complaint should be dismissed with prejudice as to all defendants and all defendants should be awarded a judgment against the plaintiff for their taxable costs and disbursements herein." (Tr. 20)

6. In entering Judgment of Dismissal August 2, 1965. (Tr. 21)

### STATEMENT OF POINTS

Appellant has filed a concise statement of points, setting forth the following points upon which he relies in this appeal:

1. The District Court adopted an erroneous rule of law by holding in effect that appellee Ramon was entitled to detain appellant Notaras a "reasonable" length of time without formal charge or bail while investigating the arrest and determining the charge.

2. The arrest, while mistaken, was lawful. Any deten-

tion of appellant Notaras by appellee Ramon, without charge and without bail, while the courts were open, was unlawful.

3. Appellant Notaras was entitled to compensation, and punitive damages, for his unlawful detention.

## **CONCISE ARGUMENT OF THE CASE**

### **Summary of Argument**

Herein, all specifications of error will be argued together, insofar as they relate to the law of the case. Damages will be discussed separately, but as appellant will mention, this court will not be asked to determine damages.

The District Court decided the case upon a fundamentally wrong basis, No statute, rule, or case decision authorized the conduct which the District Court stamped with a judicial seal of approval.

The District Court held that the appellees had a reasonable length of time in which to investigate the charge, while depriving appellant of his liberty, so as to decide what crime, if any, to charge appellant. Unless and until a charge was placed against appellant, he was deprived, wrongfully, of the right to bail, and, liberty. Therefore, appellant's liberty was at the mercy of appellees, while they made up their minds what charge to place against him, or indeed, whether to place any charge against him.

The case law of the State of Washington and the



Ninth Circuit has condemned this procedure.

*Ulvestad v. Dolphin*, 152 Wash. 580, 278 Pac. 681 (1929).

*Housman v. Byrne*, 9 Wn.2d 560, 115 P.2d 673 (1941).

*Von Arx v. Shafer*, 241 F. 649 (CCA 9, Alaska 1917).

*Runnels v. United States* 138 F.2d 346 (CCA 9, Wash. 1943).

Additionally, 42 U.S.C. 1983 is violated when state officers make an arrest and imprison the person without due process of law. Such conduct is "acting under color of state law." *United States v. Classic* 313 U.S. 299, 61 S. Ct. 1031, 85 L.Ed. 1368 (1941).

The theory, standard, and measure of damages which should have been applied by the district court are succinctly set forth in *Hague v. C.I.O.*, 101 F.2d 774 (CA3, N.J. 1939), *Antelope v. George*, 211 F.Supp. 657 (Ida. 1962), and *Basista v. Weir*, 340 F.2d 73 (CA 3, Penn. 1965).

### **Argument of Appellant**

Appellant does not complain of the original arrest. Though it subsequently appeared that the wrong person had been arrested, no legal rights of appellant were invaded, *at that time*. Had appellant been charged with grand larceny (the offense for which he ostensibly was arrested), his bail would have been fixed automatically. Whether or not appellant could have made this bail is

not determinative; the issue is whether a bail was set. If appellant then contended his bail to be excessive, other remedies would have been available to him. He would, in any event, have been eligible for release and his personal liberty restored to him without depending upon the pleasure of the appellees.

It may be noted that when appellant was finally charged (Tr. 10), his bail was fixed, and appellant's liberty was restored as a matter of practice and procedure.

The wrong occurred when appellant was detained for a non-existent crime; to-wit, "suspicion of having committed grand larceny." (Tr. 15.) "Suspicion" is not a crime in the State of Washington, nor the City of Seattle, and no authority need be cited to that. A "booking" is not a criminal charge; it is simply the mechanical method of receipting for the prisoner and admitting him to custody.

The record is replete with testimony from appellee Ramon, Seattle chief of police, that his opinion, and the known procedure of the department of which he is chief, is that this detention without bail or charge, is proper. (St. 90-116; esp. St. 92, 95.) As a matter of fact, on the day Chief Ramon testified at the trial of this case, his department was holding "Two, three" men on "suspicion of felony" without charge, and without bail. (St. 114, 115.)

There is no excuse for this flagrant violation of citi-



zen's rights. The Seattle Police Department, and appellee Ramon, is furnished legal advice from the Corporation Counsel of the City of Seattle, the King County prosecuting attorney's office (St. 111).

Even appellee Ramon, who has made personally maybe three thousand arrests in his over twenty-four years as a law enforcement officer (St. 86), testified as follows:

“Q. Is there any reason why a follow-up investigation such as interviewing witnesses, reverifying physical facts, and so on, cannot be made when the defendant is on bail?

A. No. there is not.” (St. 109.)

Appellees also produced the testimony of an “expert” on the question of proper police procedure to follow in criminal investigations. (St. 116-139.) Appellant objected to this testimony on the grounds of irrelevancy. (St. 3, St. 117, St. 121.) The District Court, while sustaining a similar objection to such testimony from appellee Ramon (St. 105-106), overruled the objection. (St. 117.)

The reason for appellant's objection is that the law is not to be decided by “customary police procedure” but, rather, by reference to the statutes and decisions of courts which have considered the issue.

Appellee's expert, Harold Booth, then testified:

“Q. Can investigations in felony cases be made when a defendant is on bail? Yes or no.

A. On what charge, sir.

Q. Any felony case.

A. Yes. Of course they can be made.

Q. How about a grand larceny case, can't an investigation be made such as you have described as being very important, can this be made if the defendant is on bail?

A. Yes.

Q. It is not necessary that the defendant be detained in custody to do the type of follow-up investigation you testified to, is it?

A. It can be done, it is possible." (St. 134, (cross-examination.)

### **Washington State Constitution and Statutes**

The Washington State Constitution provides as follows:

1. Article 1, Sec. 3: Personal Rights.

No person shall be deprived of life, liberty or property without due process of law.

2. Article 1, Sec. 20: Bail When Authorized.

All persons charged with crimes shall be bailable by sufficient sureties except for capital offenses when the proof is evident, or the presumption great.

3. Article 1, Sec. 32: Fundamental Principles.

A frequent recurrence to fundamental principles is essential to the security of individual right and perpetuity of free government.

The law of Washington provides as follows:

R.C.W. 10.19.010: Bail, When Allowable.

Every person charged with an offense, except that of murder in the first degree where the proof is evident or the presumption great, may be bailed by sufficient sureties, and bail shall justify and have the same rights as in civil cases, except as otherwise provided by law.

### Washington Case Authority

“In determining whether there has been an invasion of civil rights, lawfulness of the arrest must be measured under state law.” *Antelope v. George*, 211 F.Supp. 657 (Ida. 1962), at 659.

No Washington State case authority in point appears to have discussed this as a matter of civil rights. Traditionally, the issue has developed in the state courts within the framework of a civil action for illegal detention, false imprisonment, or false arrest.

Two opinions appear clearly to define appellant's rights, as a matter of right under state law.

(1) *Ulvestad v. Dolphin*, 152 Wash. 580, 278 Pac. 681 (1929).

The Seattle chief of police was sued for unlawful arrest and false imprisonment. The State Supreme Court (5-3 *en blanc*) reversed for erroneous instructions, and upheld the right of action.

“Nor is a police officer authorized to confine a person indefinitely whom he lawfully arrests without a warrant. It is his duty to take him before some court having jurisdiction of the offense, and make a complaint against him, and, from thence on, act with reference to the accused under the orders of the court. If a court having jurisdiction of the offense is open for the transaction of business at the time of the arrest, he must take the person arrested at once before the court. If no such court is then open, he may confine him until such time as the court does open, but he must act with reasonable promptness. Any undue delay is unlawful

and wrongful, and renders the officer himself and all persons aiding and abetting therein wrongdoers from the beginning." (at 589-590)

*Ulvestad* also settles a contention made by appellees Ramon in instant case; i.e., that he had no actual knowledge of appellant's arrest, and therefore committed no invasion of appellant's rights. A similar contention was made in *Ulvestad*, and forcefully denied. Since the charter of the City of Seattle in effect then and in effect now provided that the chief of police is the "keeper of the city prison," the court stated as follows:

"As keeper of the city prison, the chief of police is bound in law to know who is confined therein, and bound to know the purpose for which any person confined therein is so confined. He cannot escape his obligations in this respect by placing the prison in the keeping of others. If he does so, such others are his agents and he is responsible for their acts. . . . (S)ince the chief of police suffered the appellant to be confined in the prison without lawful authority, he actively participated in the wrong, and is liable to answer for the wrong. In such cases there can be no division or splitting of liability." (*Ulvestad*, at 585-586.)

(2) *Housman v. Byrne*, 9 Wn.2d 560, 115 P.2d 673 (1941).

Where a sheriff was sued for false imprisonment arising from his arrest of appellant without a warrant, and confining him without charge or bail for eleven days, and the trial court withdrew the count of false imprisonment from the jury's consideration, the Supreme Court reversed, stating in part as follows:

“It is admitted by the appellant that, even though the arrest was made without a warrant, it was, nevertheless, legal. It is the general, if not the universal, rule that, when a person is arrested and placed in jail, and is detained there for more than a reasonable time, the detaining officer is liable in an action for damages.” *Housman*, at 561.

The opinion then cites, and quotes from *Harness v. Steele*, 65 N.E. 875 (Ind.), a discussion of the rights and responsibilities of a police officer who arrests without a warrant. It is stated that such an officer cannot legally hold the person in custody longer than is necessary under the circumstances to obtain a proper warrant, and authorization. If detention lasts longer than such time as is required to obtain court authority, then false imprisonment results.

Even though *Housman* does not cite or discuss *Ulvestad*, *Housman*, reaches exactly the same conclusions; i.e., *detention following arrest without a warrant is justified only until the courts are open to issue process and admit the prisoner to bail*. In the instant case, it cannot be denied that Municipal Court and Superior Courts were open by 9:30 a.m. the morning following appellant's arrest.

Appellant takes it as self-evident that his right to personal liberty is wonderful, precious right, to be jealously guarded. If under applicable state law appellees had a right to arrest him without a warrant (and this is conceded), then under the same state law, appellant had a right to be charged promptly in order that he be



promptly admitted to bail and re-secure his personal liberty. Failure of appellees to do so, when clearly required to, constituted a callous flouting and disregard of appellant's personal liberty which amounted to an invasion of his civil rights, and redressable under federal law.

Because a separate and original cause of action was created by Title 42, §1983, and Title 28, §1343, for deprivation of civil rights under color of state law, a right which is federal in origin and cognizable only in federal courts, there is no election of remedies to be made by appellant. It would be no defense that a state remedy may be available, or that appellant did not first avail himself of a state remedy.

*McNees v. Board of Education*, 83 S.Ct. 1433, 373 U.S. 668, 10 L.Ed.2d 622 (1963).

*Monroe v. Pape*, 81 S.Ct. 473, 365 U.S. 167, 5 L.Ed.2d 492 (1961).

An extensive and recent annotation at 98 ALR2d 966 discusses Delay in Taking Before Magistrate or Denial of Opportunity to Give Bail as Supporting Action for False Imprisonment. Many state cases are cited and discussed, and it appears to be a general rule, subject to various exceptions, that most states regard such delay to constitute actionable false imprisonment. Mitigating circumstances may be intervening Sundays or judicial holidays, impaired mental or physical condition of pris-

oner, public riot, waiver or consent to delay by prisoner, ten-minute deviation for sheriff to drink a beer (consented to by prisoner). Any of these may be and have been accepted as sufficient excuse to account for delay. *None of these circumstances were present in the instant case.* In most jurisdictions, delay for purpose of investigation is not an acceptable excuse. 98 ALR2d 1011, §17(a).

### **Federal Statutes**

#### **28 U.S.C. §1343:**

“The district courts shall have original jurisdiction of any action authorized by law to be commenced by any person:

- (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.”

#### **42 U.S.C. §1983:**

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

#### **42 U.S.C. §1985:**

“(3) If two or more persons in any state . . .



conspire . . . for the purpose of depriving . . . directly or indirectly, any person . . . of the equal protection of the laws, or the equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages . . .”

### Federal Case Authority

The action of appellees, and procedures of the Seattle Police Department, have been denounced most emphatically by the Ninth Circuit in at least two decisions.

(1) *Von Arx v. Shafer*, 241 F. 649 (CCA 9, Alaska, 1917).

“ . . . (A) gross and wanton outrage was committed upon the plaintiff. . . . He was arrested and deprived of his personal liberty, the right to which is most jealously guarded in American jurisprudence, and imprisoned in jail for a period of 21 hours without a warrant, without the semblance of legal process, and upon no charge of violation of law.” *Von Arx*, 650.

It would be difficult to find a more apt expression of the circumstances of the instant case!

(2) *Runnels v. United States*, 138 F.2d 346 (CCA 9, Wash. 1943).

“While Washington appears to have no statute on the subject, in that state, as elsewhere in this country, it is the duty of a peace officer who has effected an arrest without a warrant promptly to take the person before a magistrate. This directive is not something which the officer is free to comply or ignore according as he may think the exigencies of the situation demand; it is a fundamental imperative designed to safeguard the individual in

a free land against the arbitrary exercise of power.”  
*Runnels*, 347.

The language of *Runnels*, set forth above, foretold with clarity the action of appellees herein. Appellees felt that the exigencies of the situation permitted them to detain appellant without charge or bail while they decided what charge (if any) to place against him. (St. 59, line 11.)

In truth, the record discloses the automobile of appellant was afforded more tender care and control than were his personal rights! (St. 48, line 18; St. 49, line 7; St. 52, lines 1-6.) During the time that so much attention was being directed toward appellant's automobile, his personal liberty was taken away from him. When a police officer considers the possible impounding of an automobile (St. 49, line 5) to be more important than liberty, it is no wonder the court in *Runnels*, and the Constitution of the State of Washington contain the pronouncements that any civics teacher should consider elemental.

The District Court saw fit to decide this case without reference to the settled law of the State of Washington, and the Ninth Circuit. Instead, the rationale of the decision appears to be that the police *should* have a right to detain, without charge, for some indeterminate length of time, while investigations are conducted. Even appellee Ramon and witness Booth testified that their investigations could be made with

detainee out on bail. (St. 109, St. 134.)

This rationale is not the law as appellant conceives it to be, and if it were, it would be despotic.

“It is not the function of the police to arrest, as it were, at large, and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on ‘probable cause’”. *Monroe v. Pape*, 81 S.Ct. 473, 365 U.S. 167, 5 L.Ed.2d 492 (1961).

### Damages

The District Court, of course, never reached the question of damages, by virtue of its judgment of dismissal. However, a brief discussion is in order for appellant contends the decision should be reversed, and remanded for such consideration by the District Court.

For comparative purposes, it is noteworthy that the State of Washington has held the following elements to be compensable under a state action for false imprisonment: mental suffering, anguish of mind, sense of shame, humiliation, and loss of social reputation. *Hayes v. Hutchison & Shields*, 81 Wash. 394, 142 Pac. 865 (1914).

Action for damages for deprivation of civil rights sounds in tort, and exemplary or punitive damages may be awarded. *Hague v. C.I.O.*, *supra*.

Mental suffering is a proper element of damages, and a physical tort need not be shown to justify. *Antelope v. George*, *supra*; *Nash v. Air Terminal Service*, 85 F.

Supp. 545 (C.C. Va. 1949) (Civil Rights Act inapplicable under *Nash* circumstances).

Wilfulness of defendant's conduct, and the indignity and humiliation suffered by plaintiff, are compensable elements. *Antelope v. George, supra*.

The well-reasoned opinion in *Basista v. Weir*, 340 F. 2d 74 (CA 3, Pa., 1965) discussed and analyzed damages, amounts and standards at some length, under federal civil rights statutes. The following points appear therefrom:

1. The benefits of the Civil Rights Acts were intended to be uniform among the various states, notwithstanding varying state damage rules.

2. 42 U.S. § 1983 is silent as to the kind of damages to be awarded, but does connote the award of damages of some kind.

3. Federal common law of damages applies in such cases.

4. Federal law permits the recovery of punitive or exemplary damages, and state damage rules do not pertain. (The State of Washington prohibits punitive damage awards.)

5. Nominal damages do not have to be alleged; proof of deprivation of a right to which plaintiff is entitled is sufficient.

6. Exemplary or punitive damages may be awarded

under settled federal law, even though only nominal actual damages are shown.

7. In this area of rights, society permits the offending party to be fined, and such fine awarded the injured party, in view of the peculiar interests and valuable personal rights involved.

*Basista*, *supra*, pp. 84-88.

### CONCLUSION

The District Court decided this case upon a fundamentally wrong basis. It is not the law of the State of Washington, or of the Ninth Circuit, that law enforcement agencies may detain without charge or admission to bail while they investigate to determine what type of charge to place.

Even though an arrest without a warrant may be rightful, the subsequent detention without charge may become unlawful. The law of the State of Washington is very clear on this point.

The judgment of dismissal should be reversed, with instructions to enter a judgment for appellant, embodying damages based upon the testimony taken in the case, and measured by the standards of *Hague*, *supra*, and *Basista*, *supra*.

The only way by which the chief of police of Seattle, appellee Ramon, may be convinced of the utter wrongfulness of his procedure, is to suffer damages for the

unlawful detention of appellant in this case. Others will benefit, if appellant's wrong is redressed.

Respectfully submitted,

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#### CERTIFICATE

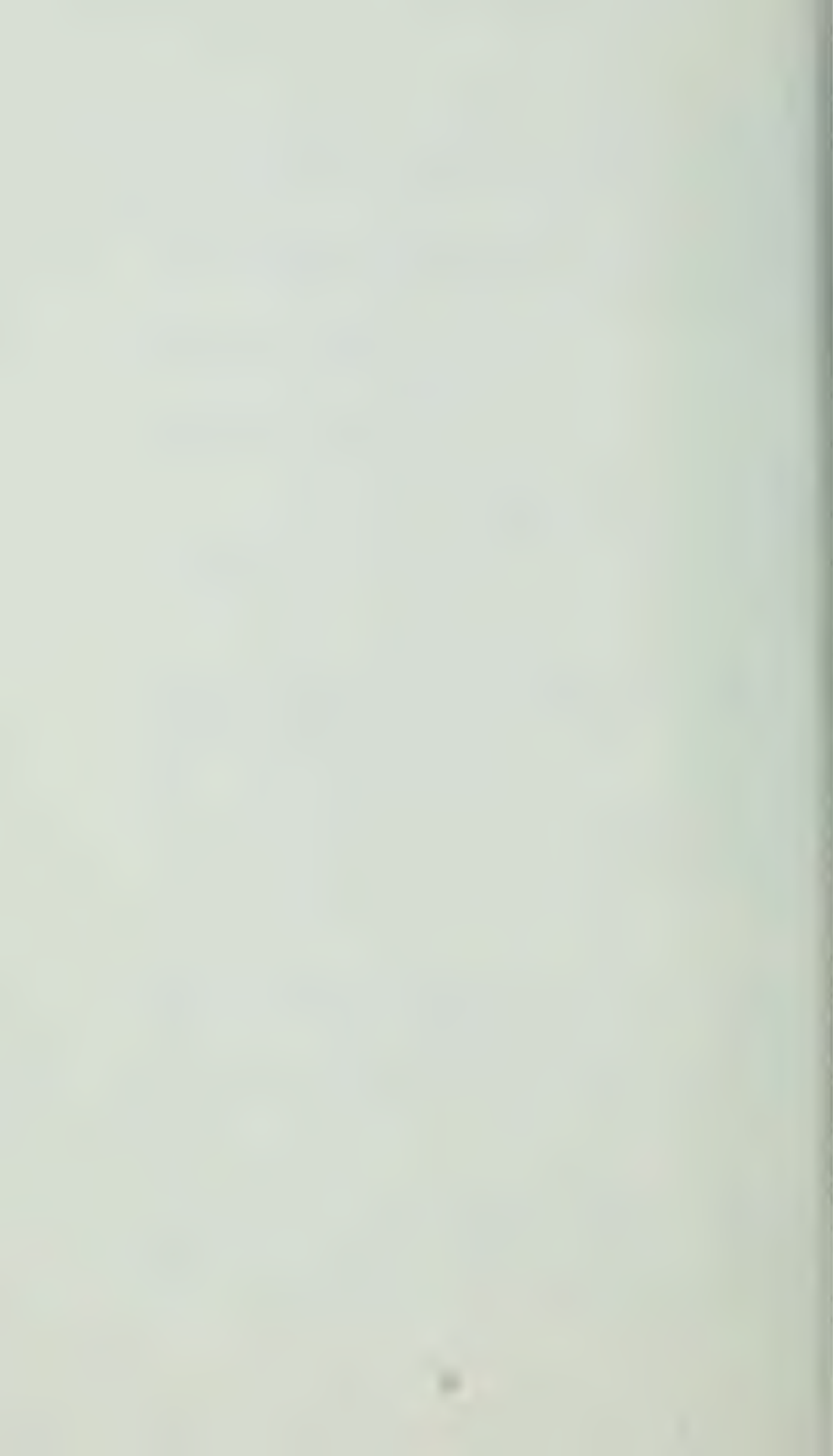
I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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WRIGHT, WENDELLS, FROELICH  
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*Attorneys for Appellant.*







FEB 14 1967

No. 20442

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**United States Court of Appeals  
For the Ninth Circuit**

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ANTHONY G. NOTARAS, *Appellant*,

vs.

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*Appellees.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

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**BRIEF OF APPELLEES**

---

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**FILED**

**DEC 13 1965**



No. 20442

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# United States Court of Appeals For the Ninth Circuit

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# United States Court of Appeals For the Ninth Circuit

ANTHONY G. NOTARAS, *Appellant*,

vs.

F. C. RAMON and JANE DOE RAMON, his wife; ARTHUR DROVETTO and JANE DOE DROVETTO, his wife; DONALD F. HANSON and JANE DOE HANSON, his wife; and DONALD KOBLE and JANE DOE KOBLE, his wife, and the respective marital communities formed by each married defendant, *Appellees*.

No. 20442

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

## BRIEF OF APPELLEES

### STATEMENT OF PLEADINGS AND FACTS

This is an action in which the appellant seeks recovery of damages from the appellees under The Civil Rights Act, wherein appellant alleges that the appellees denied him due process of law in violation of 42 U.S.C. § 1983. Appellant contends that he was unlawfully detained in the jail of The City of Seattle after being legally arrested, and asserts Federal jurisdiction under the above mentioned statute and 28 U.S.C. § 1343. At the conclusion of the trial, the court held that the appellees Dravetto, Hanson and Coble had nothing to do with appellant's detention in the City Jail and dismissed the action as to them, for that reason. The District Court dismissed the action as to appellee Ramon for the reason



that the appellant was detained in the City Jail for only a reasonable time, and appellant's rights were not violated thereby (St. 143, 144, 145).

### **COUNTERSTATEMENT OF THE CASE**

The appellant was lawfully arrested by some of the appellees at about 10:00 p.m. on January 20, 1964 in The City of Seattle on suspicion of larceny with an alternate charge of being drunk and resisting arrest, and was held without being formally charged with any specific crime until approximately 10:40 a.m. on January 22, 1964, at which time appellant was formally charged with being drunk and resisting arrest. Shortly thereafter, he was released on personal recognizance (Tr. 9, 10).

Appellants' arrest followed the theft of two suitcases, valued at \$275.00, from the lobby of the Greyhound Bus Depot in The City of Seattle about 9:45 or 10:00 p.m., Monday night, January 20, 1964. The suitcases belonged to two seventeen-year-old girls. While the girls were in the lobby with their suitcases on the floor by them, a man stepped up to them and volunteered to watch the suitcases for them. The girls declined the proffer of his services. After the man left, the girls went to the ladies' room, leaving the suitcases where they were. When the girls returned, their suitcases were gone, and they started searching for them. A Mr. Small told them that he had seen the man who had spoken to them return while the girls were in the ladies' room and take the suit-

cases (St. 62, 63). The girls went out onto the sidewalk and made inquiry and a taxi driver, a Mr. Kasmurski, told the girls that he saw a man leaving the bus depot with two suitcases which fitted the description of the girls' suitcases. Shortly thereafter, the taxi driver saw a man enter a tavern whom he identified as the one he had seen leaving the bus depot with the suitcases and when he returned to the bus depot he relayed this information to the girls and a police officer with whom they were talking. He went with the police to the tavern and pointed out the appellant, who was arrested (St. 53).

About 9:00 o'clock on the morning following appellant's arrest, his file was assigned to Detective Moran (St. 42) who proceeded to the city jail and talked to appellant (St. 43, 44). At that time, Detective Moran asked appellant if he wished to use the telephone, but appellant declined the offer, stating that he had no telephone at his home. Detective Moran then volunteered to go to appellant's home and inform appellant's wife of his arrest and arrange for her to pick up appellant's car which was parked on a street (St. 49, 50). This, Detective Moran did, and he arranged for appellant's wife to see appellant that same morning, and she saw appellant for about a half hour that morning (St. 29, 30, 32). She spent the afternoon in an effort to employ an attorney for appellant, and was successful late that afternoon (St. 30, 31).

Before going to see Mrs. Notaras on Tuesday morning, Detective Moran checked all the taverns in the area surrounding the Roll-In Tavern, where appellant sometimes worked, to see if he could find any witnesses who remembered the appellant, but most of the taverns were closed and would not be opened until later in the day. He also checked the restaurants in the area to see if any suitcases had been left or if any witnesses remembered a person who fitted appellant's description, but he could find no one (St. 49, 53).

Shortly after noon on Tuesday, Detective Moran tried to contact the cab driver who had, the night before, identified appellant as the person he had seen leaving the bus depot with the stolen suitcases (St. 53). He was unable to contact the taxi driver until 4:00 p.m., when he was able to talk to him on the phone, at which time the taxi driver said he would come to the Police Station at 8:00 a.m. the following morning (St. 54). When the taxi driver arrived the next morning, he again identified appellant as the man he saw leaving the bus depot with the two suitcases (St. 60, 61).

On Tuesday afternoon at 1:30 or 2:00 p.m., Detective Moran found the Roll-In Tavern open and its owner, Mr. Jewett present. Appellant was sometimes employed by Mr. Jewett as a part-time barkeeper, and on the preceding evening, the evening appellant was arrested, appellant came into the Roll-In Tavern at about 8:45 (St. 55, 56). At approximately 10:00 p.m., Mr. Jewett told

appellant he could go to work at 10:30 p.m., so appellant told Mr. Jewett he would leave and get some coffee and return. Mr. Jewett said appellant did leave, but he did not know in which direction, and of course he did not return (St. 56, 57, 58).

On Tuesday, Detective Moran tried to contact the two victims, the girls whose suitcases had been stolen, but was not successful. However, he did talk to the mother of one of the girls and asked the mother to talk to the girls and relate the information she got from them by telephone (St. 58). This was done on Wednesday morning, January 22nd. The information conveyed by the mother indicated that there was a problem of identification so far as the appellant was concerned. The girls felt that the man taken into custody the appellant, was not the same man who had approached them in the bus depot prior to the theft of the suitcases. A witness, Mr. Small, had stated that the same man who had talked to the two girls was the man who picked up the suitcases and left the depot (St. 62, 63). Yet, the taxi driver, when he talked to Detective Moran on Wednesday morning, still felt strongly that appellant was the person he saw leaving the bus depot with the two suitcases (St. 60, 61).

Detective Moran, after considering the time element in question, the conflicts in identification by eye witnesses, and the over-all impressions he had obtained of the case, felt it better not to charge appellant with larceny (St. 61).

On the morning of January 22, 1964, appellant's attorney obtained an order for a writ of habeas corpus directed to appellee, F. C. Ramon, to produce appellant in the Superior Court at 1:45 p.m. that date, and show cause why appellant should not be restored to his liberty. The writ of habeas corpus, and a certified copy of the order was served upon the secretary of appellee, F. C. Ramon, at 11:00 a.m. that same day; and the writ was dismissed upon its return at 1:45 p.m. as appellant had been charged with being drunk in public and resisting arrest and was admitted to bail shortly after 11:00 a.m. on that date (Tr. 10).

## **CONCISE ARGUMENT OF THE CASE**

### **Summary of Argument**

The only question presented by this appeal can be stated as follows:

Do the laws of the State of Washington permit police officers in that state to detain a person in jail for a reasonable length of time before charging or bringing such person before a magistrate in order that the police may investigate the circumstances surrounding the commission of a felony, where such person was legally arrested without a warrant on probable cause on suspicion of having committed the felony?

The answer is yes.

*Housman v. Byrne*, 9 Wn.2d 560, 115 P.2d 673;  
*State v. Winters*, 39 Wn.2d 545, 236 P.2d 1038  
 (1951);



*State v. Thompson*, 58 Wn.2d 598, 364 P.2d 527 (1961);

*State v. Self*, 59 Wn.2d 62, 366 P.2d 193 (1961);

*State v. Keating*, 61 Wn.2d 452, 378 P.2d 703 (1963);

*State v. Hoffman*, 64 Wn.2d 445, 392 P.2d 237 (1964).

### ARGUMENT OF APPELLEES

Appellant specifies as error part of Finding of Fact X (Tr. 18) and all of Finding of Fact XII (Tr. 19); and Conclusion of Law III (Tr. 20) (Appellant's Brief, pp. 4, 5). He does not, however, state wherein said Findings of Fact and Conclusion of Law are alleged to be erroneous, nor are these specifications of error supported by argument or any citation of authority. He also specifies as error Conclusions of Law IV and V and argues and cites authority in support of his argument that said Conclusions are erroneous. However, the authorities he cites do not support his position as will be shown herein.

It is therefore uncontroverted by appellant that "The detention of the plaintiff in the Seattle City Jail following his original arrest was for a period of time no greater or longer than was reasonable under the circumstances" (Finding of Fact XII, Tr. 19); and that such period of detention was no longer "than was reasonably necessary for the making of a prompt and expeditious investigation of plaintiff's participation or lack of participation in a theft of suitcases from the

Greyhound Bus Depot in Seattle, Washington” (Conclusion of Law III, Tr. 20).

As stated in the trial court’s oral decision (St. 143, 144, 145), the preponderance of the evidence sustains the findings to which appellant assigns error, and these findings fully sustain the conclusions of law to which appellant assigns error.

Appellant’s sole point on this appeal is that *any* detention of the appellant by the Seattle Police, while a court is open, without charging him or bringing him before a magistrate, is unlawful (Appellant’s Brief, pp. 5, 6). This, no doubt, would be true if Rule 5(a) of the Federal Rules of Criminal Procedure were applicable in the State of Washington. However, such rule is not applicable in the State of Washington, *Swift v. United States* (10th Cir. 1963), 314 F.2d 860; *State v. Winters*, 39 Wn.2d 545, 236 P.2d 1038 (1951), and the two Washington cases relied upon by appellant do not support his position.

In *Housman v. Byrne*, 9 Wn.2d 560, 115 P.2d 673 (1941), relied on by appellant (Appellant’s Brief, pp. 12, 13), the sheriff arrested plaintiff and held him in jail 11 days before charges were filed. On the trial of the criminal charge plaintiff was acquitted. Plaintiff’s subsequent civil suit was dismissed and on appeal the court said at page 561 of the decision:

“... the only question presented is whether the sheriff detained the appellant in jail for an un-



reasonable time without taking him before a committing magistrate.”

The court stated the general rule as follows:

“... It is the general, if not the universal, rule that, when a person is arrested and placed in jail, and is detained there for more than a reasonable time, the detaining officer is liable in an action for damages.”

The court goes on to say at page 562:

“There are no facts before us which show any reason why the appellant was detained for the period of time that he was without being taken before a committing magistrate. There being no facts herein, the question is purely one of law. We are of the view that, without any showing of a necessity of detaining him for that period of time, the detention was unreasonable.”

The court remanded the case for a new trial on the question of false imprisonment—that is, the jury was to decide whether, under all the facts of the case, the plaintiff had been detained an unreasonable length of time before being charged or taken before a committing magistrate.

In *Ulvestad v. Dolphin*, 152 Wash. 580, 278 Pac. 681, the other Washington case relied upon by appellant (Appellant's Brief, pp. 11, 12), the plaintiff was at home asleep when police officers of The City of Seattle, at the request of plaintiff's brother, pounded on plaintiff's window, awakened him, placed him under arrest, took him to the Seattle City Jail, held him for eight days and then released him. The plaintiff was not sus-

pected of having committed a crime, and his arrest was a *blatant false arrest*. During the eight days plaintiff was held in the city jail, the police were not investigating the circumstances of a crime, for no crime had been committed, and plaintiff's imprisonment was a *blatant false imprisonment*, the court holding that plaintiff had been falsely arrested as a matter of law. This case, despite the *obiter dictum* contained therein, simply is not in point on the question raised by this appeal. There was no issue as to whether the plaintiff had been held in jail a reasonable or unreasonable length of time to permit the police to investigate a felony. The court's discussion concerning confinement following a *lawful* arrest (pp. 589, 590) which is quoted by appellant at page 11 of his brief must therefore be considered as dicta which finds no support in any Washington decision dealing specifically with the reasonableness of the period of detention following a lawful arrest.

There are a number of cases in the State of Washington dealing with the question of what is a reasonable detention of a suspect while the police are investigating a felony for which the suspect was legally arrested on probable cause, and significantly, none of these cases refer to the isolated dicta of the *Ulvestad* case referred to above, or for that matter even cite the *Ulvestad* case. Such dicta is not in point and it is not the law of the State of Washington.

In the case of *State v. Winters*, 39 Wn.2d 545, 236

P.2d 1038 (1951), the defendant was arrested on February 3, 1950 and was held for six days following his arrest without being taken before a justice of the peace or being charged with a specific crime. A confession was obtained on the sixth day of his detention and was admitted in his trial. He appealed, contending that the confession was not admissible because it was obtained in violation of law. The Supreme Court of the State of Washington answered his contention, commencing at page 549 of the opinion as follows:

“The appellant contends that the confession was not admissible because it was obtained six days after his arrest and without his having been taken before a justice of the peace, as a committing magistrate, in the meantime. He cites the statutes pertaining to procedure before a justice of the peace. It is, of course, somewhat similar to the procedure before United States commissioners, as provided for in Federal Rule 5 (a) of the Federal Rules of Criminal Procedure. He then cites *McNabb v. United States*, 318 U.S. 322, 87 L.Ed. 819, 63 S.Ct. 608, and *Upshaw v. United States*, 335 U. S. 410, 93 L.Ed. 100, 89 S.Ct. 170, to the effect that such a delay in bringing a prisoner before the commissioner makes a confession inadmissible. These cases are not in point. This is neither a Federal case nor a proceeding before a justice of the peace. The cases relied upon are not predicated upon either Washington state or Federal constitutional provisions, but only on a rule of procedure. There is no constitutional or statutory provision in the State of Washington having to do with the use of confessions as evidence against a defendant in a criminal trial, except Rem. Rev. Stat. § 2151. Under the purview of the statute it was not error to admit the confession.”

In *State v. Thompson*, 58 Wn.2d 598, 364 P.2d 527

(1961), the defendant was arrested without a warrant, the officers having reasonable grounds to believe that he had committed a felony. He was held in jail six days before he was charged with a crime, during which time the officers were investigating the circumstances of the felony and were questioning the defendant. During five days of his detention the defendant made several confessions. At his trial, the defendant was convicted of second degree murder, and on appeal alleged, among other things, that his confinement for six days, prior to his arraignment, was illegal. In disposing of this contention and in sustaining defendant's conviction, the Washington court states at page 606:

“The appellant was arrested for the attempted rape of Sharon Sharp, but, in accord with the local police custom, he was held on an open charge by being booked for intoxication while an investigation of the attempted rape of Sharon Sharp and the murder of Mrs. Tussing was being made. He was arraigned on the instant charge six days after his arrest. At that time, the court appointed counsel for him.

“Appellant now contends that his confinement on an *open charge* prior to his arraignment was illegal.

“We do not agree. Appellant was legally arrested for a felony. He was held on a so-called open charge to permit a reasonable investigation before the filing of an information. The police record or *booking* is not the charge upon which a defendant goes to trial and has no particular significance after a formal charge has been lodged. Had he cared to question his confinement prior to filing the information, he could have done so by habeas corpus. After the filing of an information, habeas corpus will not lie.”

In the case of *State v. Keating*, 61 Wn.2d 452, 378 P.2d 703 (1963), the Washington court again expressly rejected the rule announced in *McNabb v. United States*, 318 U.S. 322, 87 L.Ed 819, 63 S.Ct. 608, citing *State v. Winters*, 39 Wn.2d 545, and *State v. Self*, 59 Wn.2d 62, 366 P.2d 193 (1961), a case in which the United States Supreme Court denied certiorari in 370 U.S. 929, 8 L.Ed.2d 508, 82 S.Ct. 1569.

In the case of *State v. Hoffman*, 64 Wn.2d 445, 392 P.2d 237 (1964), the defendant contended that his motion to suppress two incriminating statements given by him during his four-day detention and before he was charged or brought before a magistrate, should have been sustained by the trial court for two reasons. First, he claimed his detention became unlawful when he was not taken forthwith before a magistrate following his arrest; and secondly, he alleged that he was held incommunicado and denied the right to counsel until he had given the statements.

The Washington court indicated that it was thinking in terms of the impact of the Fourteenth Amendment when it answered Hoffman's contentions at page 450 as follows:

"By contention (a) defendant, in effect, again urges upon us the adoption of a rule of exclusion akin to the 'McNabb rule' (*McNabb v. United States*, 318 U.S. 332, 87 L.Ed. 819, 63 S.Ct. 608 (1943)). Although we do not and will not abide the practice of holding persons for unreasonable times without charge and arraignment, we have



heretofore refrained from adopting the *McVabb* rule of exclusion. Instead, we have relied upon the ultimate test of 'voluntariness' in determining admissibility of confessions. (Citing cases.)

"It may well be that future developments, or a conviction that law enforcement agencies of the state are persistently indulging in undue and extensive delays between arrest and arraignment, may dictate a reconsideration of our position. Until that time, however, we adhere to our present approach."

Hoffman's conviction was sustained.

Appellant's only support for the rule he urges upon this court is Rule 5 (a) of the Federal Rules of Criminal Procedure, but such rule has no application in the case at hand. In *Swift v. United States*, (10th Cir., 1963), 314 F.2d 860, the court states at page 862:

"... Rule 5(a), which requires that a person who is arrested be taken before a Commissioner without unnecessary delay, is involved only when an officer makes an arrest under federal law. It has no application in this instance since the record here is clear that, at the time the statement was made by Swift, he had been arrested on a state charge, and was in the sole custody of state officers ... There is nothing in the record which indicates that Swift was being unlawfully detained by the state officers or anyone else, at the time he made the statement to Kramer ..."

An illustration of the rule that state and not federal criminal procedures apply in determining whether the rights of a state criminal defendant have been violated is *Gallegos v. Nebraska*, 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed 86, in which a thirty-eight year old Mexican farmhand was not brought before a magistrate for fifteen

days following his arrest. During the interim, he confessed to facts upon which he was later convicted of manslaughter. On appeal to the Supreme Court of the United States, this conviction was affirmed. The petitioner claimed on appeal that admission of his confession into evidence violated his rights under the due process requirement of the Fourteenth Amendment. The court cited *Malinski v. New York*, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029, quoting from that opinion as follows:

“ ‘... the use of any confession obtained in violation of due process requires the reversal of a conviction even though unchallenged evidence, adequate to convict, remains . . . ’ ”

The court nevertheless sustained the conviction, it appearing to the court that under the laws of Texas and Nebraska where the petitioner's detention took place, the detention did not clearly violate the Fourteenth Amendment.

The Washington authorities cited above demonstrate that in the State of Washington there is no statute or judicial precedent fixing any specified time within which a lawfully arrested person must be charged with a specific crime. It is made clear in *Housman v. Byrne*, 9 Wn.2d 560, and *State v. Thompson*, 58 Wn.2d 606, however, that a law enforcement agency has a “reasonable time” within which to charge the arrested person with a crime or bring him before a committing magistrate. The *Housman* case also makes it clear that the



court will consider evidence of justification where there is an allegedly unreasonable delay.

Appellant, on page 15 of his brief, cites 98 A.L.R.2d 1011, § 17 (a) for the proposition that in most jurisdictions delay for purposes of investigation is not an acceptable excuse. In the same annotation at page 1014, § 17 (b), under the heading "Delay for investigation or consultation held justified" it is stated that in some jurisdictions a suspect may be held for a reasonable time to permit an investigation, and Washington is one of those jurisdictions.

Appellant mentions on pages 9 and 10 of his brief that an investigation of a felony can be made while a suspect is at liberty on bail, but it is obvious that an ill-considered charge may not be filed merely for the purpose of fixing bail.

The other cases relied upon by appellant are similarly not in point. In *Von Arx v. Shafer*, 241 F. 649 (CCA 9, Alaska, 1917), (Appellant's Brief, page 16), the Federal statute applicable in Alaska provided that one arrested without a warrant be brought before a magistrate "without delay."

*Runnels v. United States*, 138 F.2d 346 (CCA 9, Wash. 1943), (Appellant's Brief, page 16), was a Federal criminal case and was governed by Federal law, and although the court referred to Washington law by way of dicta, the court stated at page 347:

"The case (at bar) clearly falls within the rule

of *McNabb v. United States* and *Anderson v. United States*, supra.”

These two Federal cases, in their application to the case at bar, can be correctly characterized in the language of the Washington Supreme Court in *State v. Winters*, 39 Wn.2d 545, 236 P.2d 1038 (1951), when it spoke of the *McNabb* case and one other Federal case, at page 549:

“ . . . These cases are not in point. This is neither a Federal case nor a proceeding before a justice of the peace. The cases relied upon are not predicated upon either Washington state or Federal constitutional provisions, but only on a rule of procedure . . . ”

Appellant, at page 18, 19 and 20 of his brief, discusses the “question of damages.” The trial court made no finding or conclusion on damages, and it is submitted that no question in regard thereto is before this court on this appeal and that such portion of appellant’s brief should therefore be disregarded.

### CONCLUSION

In the State of Washington one who is legally arrested on suspicion of having committed a felony may be held in jail for a reasonable time before being charged or taken before a magistrate while the police are investigating the circumstances of the felony. The trial court found on uncontroverted evidence that:

“ . . . the detention of the plaintiff Notaras by and on behalf of the defendant Ramon, as Chief of Police of the City of Seattle, was for a period

no greater or longer than for a reasonable time . . .  
*It (the investigation) was a fair, needful, essential  
 and reasonable inquiry for a detective to make in  
 his laudable efforts to make sure that a possibly  
 innocent man would not be unlawfully charged . . .*"  
 (St. 143).

It is submitted that the judgment of the trial court  
 should be sustained.

Respectfully submitted,

A. L. NEWBOULD

Corporation Counsel

CHARLES R. NELSON

Assistant.

*Attorneys for Appellees.*

### CERTIFICATE

I certify that, in connection with the preparation of  
 this brief, I have examined Rules 18 and 19 of the  
 United States Court of Appeals for the Ninth Circuit,  
 and that, in my opinion, the foregoing brief is in full  
 compliance with those rules.

CHARLES R. NELSON

*Of counsel for Appellees*

FEB 14 1967

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United States Court of Appeals  
For the Ninth Circuit

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ANTHONY G. NOTARAS, *Appellant*,

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

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REPLY BRIEF OF APPELLANT

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JAN 8 1966



**United States Court of Appeals**  
**For the Ninth Circuit**

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# United States Court of Appeals For the Ninth Circuit

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## REPLY BRIEF OF APPELLANT

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### INTRODUCTION

Appellant accepts appellees' Statement of Pleadings and Facts and appellees' Counterstatement of the Case (Appellees' Br. pp. 1-6). There are, in any event, no controverted facts on this appeal, nor were there at the time of trial.

On page 7 of appellees' brief, under Argument of Appellees, appears mis-statement of appellant's position. It is undoubtedly unintentional.

Appellant assigned error to all Findings of Fact and Conclusions of Law which held the appellees' conduct to be lawful, reasonable, or justified. (Appellant's Br. pp.4-5). At page 6 of appellant's brief, it is stated:

"Herein, all specifications of error will be argued together, insofar as they relate to the law of the case."

Therefore, the statement by appellees (Appellees' Br. p. 7) that the specifications of error are not supported by argument or citation of authority, or that Finding of Fact VII is uncontroverted, simply is not true. Appellant *did* specify error to the questioned findings, *did* support such specifications of error by argument and citation of authority (Appellant's Br. pp. 6-18), and Finding of Fact XII (Tr. 19) *is* controverted.

#### ARGUMENT IN REPLY TO APPELLEES

Appellees seem to take the position that the Supreme Court of the State of Washington did not mean what it said in the only two cases which specifically considered unlawful detention *in jail* by law enforcement authorities. *Housman v. Byrne*, 9 Wn.2d 560, 115 P.2d 673 (1941); *Ulvestad v. Dolphin*, 152 Wash. 580, 278 Pac. 681 (1929).

No clearer exposition of the vice of appellees' conduct toward appellant Notaras could be found, than in the quotation from *Housman* set forth by appellees at page 9 of their brief.

"There are no facts before us which show any reason why the appellant was detained for the period of time that he was without being taken

before a committee magistrate. There being no facts herein, the question is purely one of law. We are of the view that, without any showing of a necessity of detaining him for that period of time, the detention was unreasonable."

If appellees are to contend that their detention of Notaras was justified by circumstances requiring such detention prior to charge, what is their justification?

It will be noted that both appellee Ramon and his "expert" witness Booth testified that their follow-up investigation could have been made with appellant out on bail (Br. of Appellant, p. 9; St. 109, St. 134). No arresting officer changed his story (St. 112); no testimony established that appellant gave a false alibi or conflicting statements (St. 112). The eye-witness identification of appellant did not change (St. 60-61). While it is true that the theft victims were not positive that the police had arrested the correct person (St. 62-63), this does not amount to a justification for holding appellant in custody, without charge or bail, while the police confirm their witnesses. Since probable cause was established for the initial arrest, appellees had no reason to fear false arrest suit or consequences.

It will be noted that appellees' "expert" testified that frequently possible inconsistencies must be faced and resolved, and that one other reason to detain a suspect in custody is to prevent him from destroying possible evidence (St. 122). There is no evidence, testimony, inference or innuendo from any of appellees' witnesses that such was necessary with respect to appellant Notaras. Actually, all that the witness Booth did testify to as necessary in this case was that "reasonable time

for investigation should be allowed". (St. 128.) *He did not testify that the suspect must be in custody to do this investigation.* (It must be remembered that all of Booth's testimony came in over appellant's objection as irrelevant (St. 117; 121.) Booth actually testified to the converse of appellees' position; i.e., such detention was *not* necessary to permit follow-up investigation (St. 134).

Appellees cannot have their cake and eat it too. They must not be permitted to callously disregard private rights of freedom, on the pretense of follow-up investigations, and at the same time justify illegal detention during such investigation when their own testimony establishes that reasonable police procedures will not be impaired if the suspect (Notaras) is at liberty on bail.

Viewed in this light, it is apparent that no justification existed for the continued, illegal detention of appellant. Their contention to the contrary at page 16 of their brief falls. Even if appellees' interpretation of *Housman* and *Ulvestad* is correct, its application to the circumstances of the case at bar does not justify their conduct.

Appellees attempt to buttress their case by quoting in their Conclusion (Appellees' Br. p. 17) the very Finding of Fact to which appellant has assigned error!

#### **ARGUMENT OF APPELLANT IN RESPONSE TO APPELLEES' CITATION OF AUTHORITY**

1. *State v. Winters*, 39 Wn.2d 545, 236 P.2d 1038 (1951), cited by appellees at page 10-11 of their brief.



Does not say what appellees say it says. Entire point of opinion was whether appellant Winters' confessions were admissible because taken from him (voluntarily) prior to his arraignment on several rape counts. Washington Supreme Court refused to follow rule of *McNabb v. United States*, 318 U.S. 322, 87 L.Ed. 819, 63 S.Ct. 608, as contended for by appellant, and stated:

"There is no constitutional or statutory provision in the State of Washington having to do with the use of confessions as evidence against a defendant in a criminal trial, except Rem. Rev. State. §2151. *Under the purview of the statute it was not error to admit the confession.*" *Winters*, p. 549. (Emphasis supplied.)

Rem. Rev. Stat. §2151 (now codified as R.C.W. 10.58.030) reads as follows:

"10.58.030 Confession as evidence. The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats;; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony."

At no point in the *Winters* opinion is any discussion of any contention that Winters' civil rights had been violated by virtue of being held incommunicado or without charge prior to arraignment or being taken before a committing magistrate. For ought that the opinion discloses, Winters had been promptly charged with *some* crime promptly upon his arrest.

The opinion simply does not say that in the State of Washington citizens may be held in the city jail



without charge, bail or opportunity to regain their personal freedom.

2. *State v. Thompson*, 58 Wn.2d 598, 364 P.2d 257 (1961), cited by appellees at pp. 11-12, contains language, which if taken out of context, superficially supports appellees' position.

In *Thompson*, appellant was held on an open charge for six days while booked on an intoxication charge, during a murder and attempted rape investigation. At the expiration of six days, Thompson was arraigned on a murder charge. Following conviction by jury of second-degree murder, Thompson appealed, alleging, *inter alia*, his confinement on an open charge prior to arraignment to be illegal.

"We do not agree. Appellant was legally arrested for a felony. He was held on a so-called open charge to permit a reasonable investigation before the filing of an information. The police record or *booking* (sic) is not the charge upon which a defendant goes to trial *and has no particular significance after a formal charge has been lodged. Had he cared to question his confinement prior to filing the information, he could have done so by habeas corpus.* (Emphasis supplied.) After the filing of an information, habeas corpus will not lie." *Thompson*, p. 606.

The key to distinction between the cited case and the case on appeal lies in the emphasized portion of the above quotation. No amount of detention, illegal or otherwise, can affect the validity of a subsequent charge. A defendant is either guilty or not guilty of a criminal charge made. This has no bearing upon detention *prior*

to charge. This is all the Washington Supreme Court was saying.

In the instant case, appellant Notaras makes no contention concerning his confinement subsequent to the charges eventually filed, and appellant never contended that his illegal detention prior to the placing of misdemeanor charges affected his guilt or innocence.

Appellees misconstrue the point of the *Thompson* decision, and this is highlighted by the following quotation from that opinion:

“Based upon appellant’s theory that his confinement prior to the information was illegal, he now contends that his confessions made during that period were inadmissible at the trial on the instant charge.” *Thompson*, p. 607.

The only principle that this portion of *Thompson* establishes is that the Washington Supreme Court is refusing to apply the *McNabb* doctrine, where the confinement, if under federal practice, would render confessions inadmissible.

It is important to note that Notaras never made any confession in the instant case. There is no contention that *McNabb*, or Rule 5(a), Fed. R. Crim. Proc., has any application, and appellant never contended that his subsequent trials, on the misdemeanor charges, were invalid because of the detention.

Another point of distinction between appellant Notaras and *Thompson* is that Notaras *did* test his illegal confinement by *habeas corpus* (Tr. 10). This is the traditional method of attacking illegal detention, and

the proof of the pudding, as it were, is in the reaction of appellees to the writ. The reaction was immediate formal charge and this, of course, was necessary to justify continued detention.

If the law were as contended by appellees, why was not such a return to the writ made, basing Notaras' detention simply upon suspicion and because the police needed a reasonable time in which to investigate the circumstances? Police never make such returns to *habeas corpus* writs, and the reason is plain: detention without charge and admission to bail is illegal in the State of Washington.

Regardless of the points of distinction between *Thompson* and appellant's position, the language of that opinion is unfortunate. Thompson's attorneys twice tried for hearing by the United States Supreme Court. 370 U.S. 945, 8 L.Ed.2d 811, 82 S.Ct. 1590 (cert. den.); 370 U.S. 855, 9 L.Ed.2d 94, 83 S.Ct. (petition for rehearing denied).

Fortunately, the United State Supreme Court did take cognizance of another decision from the State of Washington rendered in the same year, and one in which the Washington State Supreme Court again implied approval of lengthy detention for investigation prior to filing formal charge. *State v. Haynes*, 58 Wn.2d 716, 364 P.2d 935 (1961).

Therein, it appeared that Haynes had been detained 14 hours prior to charge, on the "small book" procedure of the Spokane Police Department. Other points were considered by the Washington State Supreme Court,

and the main thrust of the opinion was that confessions extracted during such period of detention were not *ipso facto* bad as being involuntary.

The United States Supreme Court took a different view, and reversed for a new trial, on the basis of denial of due process of law. *Haynes v. State of Washington*, 373 U.S. 503, 10 L.Ed.2d 513, 83 S.Ct. 1336 (1963).

Commenting upon this "small book" practice, the opinion states, in a footnote at 10 L.Ed.2d 516:

"Apparently recognizing the questionable nature of such a practice, the Spokane police, we are told, have since abandoned use of the 'small book' and the attendant restrictive practices."

Whether the U. S. Supreme Court was condemning the detention without charge, condemning the incommunicado nature of such detention, or intending to do so if the practice had continued, is not clear. It is clear, however, that the earlier language of *Thompson*, so freely cited by appellees, can no longer stand quite as boldly or clear cut as appellees would argue.

3. Appellees cite *State v. Keating*, 61 Wn.2d 452, 378 P. 2d 703 (1963) at page 13 of their brief in support of the statement that the exclusionary rule of *McNabb v. United States* does not apply to the State of Washington. With this statement of the law, appellant does not argue. The statement is, however, not apposite. Appellant Notaras is *not* trying to have any confession or admission rendered inadmissible by virtue of his illegal detention.

4. The citation by appellees of *State v. Hoffman*,



64 Wn.2d 445, 392 P.2d 337 (1964) at page 13 of their brief also founders on the same point of inappositeness.

The quotation at page 13 of appellees' brief from *Hoffman* shows clearly that the contention was made in an effort to have excluded from trial consideration certain confessions made prior to arraignment. The entire answer to this contention was explained by the court as follows:

"By contention (a) defendant, in effect, again urges upon us the adoption of a rule of exclusion akin to the 'McNabb rule' . . . (W)e have heretofore refrained from adopting the *McNabb* rule of exclusion. *Instead*, we have relied upon the ultimate test of 'voluntariness' in determining admissibility of confessions. (Citing cases.)"

It is not necessary for appellant to reply to the citation of *Gallegos v. Nebraska*, 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed. 86, at pages 14-15 of appellees' brief, as it does not apply to any contention made by appellant herein.

#### **ADDITIONAL ARGUMENT IN REPLY TO APPELLEES**

Many civil cases in the State of Washington have considered the action of false imprisonment against police authority, even though only two have started from the premise of a lawful arrest, followed by unlawful detention.

In *Neff v. United Pacific Insurance Co.*, 58 Wn.2d 618, 364 P.2d 515 (1961), verdicts were sustained against county sheriffs, where it appeared plaintiffs were arrested on misdemeanor charges committed out of the presence of the sheriff, and unlawfully detained

*prior* to issuance, service and execution of lawful warrants. (Washington has adopted the rule that arrests based upon misdemeanors committed out of the arresting officer's presence can only be made upon warrant.) The period of unlawful detention *prior* to obtaining and serving the warrants was between fifteen and forty minutes. *id.*, 622. Jury awards were affirmed on appeal, "despite the relatively short period of respondents' involuntary confinement prior to the issuance and service of the warrants..." *id.* 626.

The *Neff* case, while not controlling herein, contains a persuasive analogy and clearly interprets the status of state law relating to unlawful, involuntary confinement. A detention which is not based upon law is unlawful, no matter what weighty arguments the police may have to support their detention. Personal liberty is too precious and fragile to be made dependent upon the whims of the police. It borders upon speciousness to argue that detention during investigation is better for the suspect than to immediately charge the detainee and subsequently drop the charge. Appellees so argue (Br. of Appellees, p. 15).

The vice of appellees' position and the entire reason for this case to be appealed to this court lies in their statement that the Seattle Police Department had a right to deprive Anthony Notaras of his personal liberty for a "reasonable length of time" while his conduct was being investigated.

Who is to determine what is a reasonable deprivation of liberty? Is this to be left to the discretion of the

police? Is it to be an average of the number of times the police have done this in the past? Granted, the work of the police may be made easier with the suspect in custody, but is this to be the criterion? What is to occur if two policemen differ as to what is a reasonable length of time? What happens when, as happened in this case, the chief of police doesn't even know the suspect is being detained without charge and bail? It is clear, under Washington law, that the chief of police is individually responsible and liable for the conduct of his officers. *Ulvestad v. Dolphin*, 152 Wash. 580, 278 Pac. 681 (1929).

Final note should be taken of two arguments advanced by appellees, one at page 14 of their brief and one at page 16 of their brief.

At page 14, appellees state:

“Appellant's only support for the rule he urges upon this court is Rule 5 (a) of the Federal Rules of Criminal Procedure, but such rule has no application in the case at hand.”

At page 16, appellees state:

“Appellant mentioned on pages 9 and 10 of his brief that an investigation of a felony can be made while a suspect is at liberty on bail, but it is obvious that an ill-considered charge may not be filed merely for the purpose of fixing bail.”

These two statements, considered together, exhibit a rather callous attitude toward fundamental concepts of liberty and the dignity of the individual to his freedom. The statements, in addition, are not correct conceptions of the law.



Appellant does not cite Rule 5(a) FRCP in his brief, nor was it urged to the trial court.

*The posture of this case is that appellees labor under the burden of justifying appellant's detention. Housman v. Byrne, supra, clearly states that "without any showing of a necessity of detaining him for that period of time, the detention was unreasonable."* p. 562. No facts, except the routine of normal police investigation and follow-up, were submitted by appellees at the trial. Even this routine did not require appellant to be detained. (St. 109, 134.)

Therefore, with appellees not justifying their conduct, appellant's case is obviously supported by case law of the State of Washington and no further citation of authority would have to be made.

If appellees seriously felt that Notaras was detained on an "ill-considered charge," he would have been released. If it was not an "ill-considered charge," then he should have been charged and admitted to bail. Lawful arrest and charges of crime are a hazard of existence. This is the reason probable cause must be established for arrests without warrant. The fact, if such be the case, that the charges are subsequently dropped, or that investigation does not bear out the initial charge, is no justification for continuing the detention without giving the detainee any possibility of regaining his freedom, as no bail can be set. The only method of attacking such detention is via *habeas corpus*, and this was done in Notaras' case. (Tr. 10.)

**CONCLUSION**

The arguments advanced by appellees are not supported by Washington State or federal authority. The citations of Washington case authority by appellees do not justify appellees' conduct, and *no case of the State of Washington authorizes detention without bail or charge following a lawful arrest*. The State of Washington has refused to adopt the rule of McNabb, but that argument is not before this court.

The decision of the trial judge was based upon a fundamental misconception of the law of the case.

The judgment of dismissal should be reversed, with instructions to enter a judgment for appellant, embodying damages in accord with authority cited in appellant's opening brief. (Br. of Appellant, pp. 18-29.)

Respectfully submitted,

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**CERTIFICATE**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit,

and that, in my opinion, the foregoing brief is in full compliance with those rules.

---

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*Attorneys for Appellant.*



FEB 14 1967

No. 20,444 ✓

**United States Court of Appeals  
For the Ninth Circuit**

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J. D. MALLON and CHELLIE MALLON,	}
vs.	
UNITED STATES OF AMERICA,	
	<i>Appellants,</i>
	<i>Appellee.</i>

**APPELLANTS' OPENING BRIEF**

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**FILED**

JUN 8 1966

WM. B. LUCK, CLERK



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**APPELLANTS' OPENING BRIEF**

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**JURISDICTIONAL STATEMENT**

This is an appeal from a final judgment entered on October 31, 1964, by the United States District Court for the Northern District of California, Northern Division. The underlying action was brought by the United States to condemn certain property under the power of eminent domain and of the authority of the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. 258(a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Acts of Congress approved April 24, 1888 (25 Stat. 94, 33 U. S. C. 591) and March 1, 1917 (39 Stat. 948, 33 U. S. C. 701); the Act of Congress approved December 22, 1944 (Public Law 534, 78th Congress); and the Act of Congress approved September 10, 1959 (Public Law 86-254). The Dis-

trict Court's jurisdiction was invoked under 28 U.S.C. 1345. A timely notice of appeal from said final judgment was filed on May 17, 1965. This Court's jurisdiction accordingly rests upon 28 U. S. C. 1291.

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### **STATEMENT OF THE CASE**

This is a suit to condemn real property in connection with the establishment of the Black Butte Dam and Reservoir project in Tehama and Glenn Counties in the State of California. This case is one of a series of proceedings instituted by the United States in order to acquire the necessary land for such project. The appellants herein were the owners of Tract No. 104 described in the complaint at the time such proceeding was instituted. After certain preliminary discovery and pre-trial procedures a jury trial was held commencing on October 15, 1964 for the purpose of determining just compensation for the taking of Tract 104. A verdict was rendered by said jury in the sum of \$155,000.00 and judgment determining such sum to be just compensation was entered thereon on October 31, 1964. A motion to amend the judgment with respect to the addition of interest and a motion for new trial were submitted to the trial Court on November 13, 1964 and denied in each instance on March 15, 1965. Appellants appeal from that portion of the judgment which determines just compensation for the taking of said property to be the sum of \$155,000.00.

### FACTS OF THIS CASE

The subject project takes its name from Black Butte, a prominent landmark rising some 1100 feet, located on the subject property. R.T. 79.<sup>1</sup> The plaintiff condemned the entire holding comprising approximately 1,139 acres. R.T. 66. The land is approximately 10 or 12 miles west of Orland. R.T. 392. There were improvements including barns, a house, cabin, domestic water supply, fences and the like. R.T. 67-74, 156-159, 393-395.

There are four or five locations of rock outcropping or lava caps. R.T. 676, 677.

The land was traversed by Stoney Creek, approximately 488 acres lying south of Stoney Creek, R.T. 791. The property had been used for both sheep and cattle. It was the consensus of all of the valuation witnesses that this was its highest and best use. R.T. 82, 166, 430, 688.

Some of the property was level and under irrigation, some of it was subject of an effort on the part of the owner to install sprinkler irrigated clover during the year preceding the date of take, R.T. 107, and the remainder varied from steep to gently sloping range land. R.T. 675. There were substantial differences of opinion concerning the number of livestock which the

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<sup>1</sup>All references to the record herein are as follows:

C.T. Clerk's Transcript, Volume One;

R.T. Reporter's Transcript, Volumes One to Four inclusive; See also Reporter's Note on page following page 875.

There are two sets of pages numbered 867-876, inclusive.

A reference to the second set will be by the page number followed by (2) i.e. 867(2).

land could sustain, i.e., carrying capacity. R.T. 110, 208, 432, 696.

The valuation witnesses sharply differed as to the extent of irrigated and irrigable land, the relative value of the butte range, and the accessibility of the property lying on the north side of the creek. Of the subject property's total of 1139 acres, R.T. 66, defense witnesses Mallon and Michael testified that 167 acres were irrigated. R.T. 84, 85, 299. Government witness Campbell conceded that 77 acres north of Stoney Creek were irrigated land. R.T. 412. Government witness Rhodes said this area was 86 acres. R.T. 714. 90 acres on the south side of Stoney Creek were planted and sprinkler irrigated according to appellant Mallon. R.T. 84. Government witness Campbell admitted seeing the sprinkler system, R.T. 417, but did not value that portion as being irrigated because he saw no established stand. R.T. 409. Government witness Rhodes, however, observed clover in the area "doing fine" in parts. R.T. 687. He treated the total area under irrigation as comprising 176 acres, if the sprinkler area is included, R.T. 714, under an alternative method.

The sharp differences reflected in the views of the various witnesses concerning the subject property and the sale properties are shown in the following opinions of value of the subject property.

Mallon . . . . .	\$330,000.00—\$281.00 per acre	R.T. 108
Michael . . . .	\$307,000.00—\$270.00 per acre	R.T. 207
Smith . . . . .	\$295,000.00—\$259.00 per acre	R.T. 359
Campbell . . .	\$155,000.00—\$135.00 per acre	R.T. 463
Rhodes . . . . .	\$150,000.00—\$131.70 per acre	R.T. 691

**SUMMARY OF ARGUMENT**

The verdict of \$155,000.00 rests upon the opinions of two government witnesses, Bert Campbell and Richard Rhodes. Their nearly identical opinions, \$155,000.00 and \$150,000.00, respectively, were based chiefly if not solely upon two sales of land located twenty miles away from the subject property. Although described by these witnesses as comparable lands having the same highest and best use as the subject property, i.e., a year round livestock operation, it was established by uncontroverted evidence that each property was purchased exclusively for residential subdivision purposes, without regard for agricultural or livestock use whatsoever. As a result, these two sales provide no proper standard for valuing the subject property and the opinions based thereon are without foundation. The verdict is therefore without substantial evidentiary support. The trial Court arbitrarily ruled such sales to be admissible and at the same time excluded four landowner sales which prevented one of their expert witnesses from fairly presenting his opinion and his reasons therefor.

Government witness Rhodes took a notebook containing some thirty pages to the stand and referred to it during direct and cross-examination. At the commencement of cross-examination defense counsel requested an opportunity to examine the contents. Except for two pages the request was denied by the trial court at the instance of government counsel.

Campbell testified that the American Appraisal Institute imposes high ethical standards on its members



and that it maintains a disciplinary committee authorized to act in cases where members appear on opposite sides and testify to substantially different figures. His testimony on this subject was summarized by government counsel in this question which Campbell answered affirmatively: "Unless you are a member of the Institute, then there is really no governing control over a man who merely calls himself an appraiser. Is that correct?"

However, the court would not allow defense counsel to ask Campbell and Rhodes about incidents wherein such witness and another member of such institute had testified to vastly different figures without disciplinary action by that organization. The court also denied defense counsel an opportunity to question Campbell about an incident when he, although appearing as an expert witness for the condemnor, made an offer in open court to purchase the property then being valued in an effort to create evidence and, further, that no disciplinary action was taken by such institute.

As a result of such adverse rulings by the trial court the self-serving statements of these witnesses went unchallenged, the doubt cast by them upon the land-owners' witnesses unopposed.

The trial court further denied appellants' efforts to show the nature and extent of compensation being paid to these government witnesses, an inquiry commonly allowed on the subject of bias and motive. Moreover, such inquiry is specifically authorized by a California statute appropriate and applicable herein.



The two government witnesses had testified at length to the close comparability of the two sale properties upon which they chiefly relied. In order to rebut this testimony appellants produced a witness who had a lifetime of experience in the area of the two counties, Glenn and Tehama, who had been a tenant on both of the sale properties and was thoroughly familiar with them. His opinion that the Black Butte area land (subject property) was far superior to the two sale properties for producing feed for livestock was struck by the trial court and the jury admonished to disregard it, not because of any question of his qualification to express the opinion, but on the theory of improper rebuttal. The ruling was in error. The court's action deprived appellants of their right to rebut such evidence.

Finally, the court erred prejudicially in the instructions in several important aspects. Although the record includes extensive testimony by various opinion witnesses of a hearsay or otherwise generally inadmissible nature and although defense counsel had specifically withdrawn an objection to such testimony upon the assurance of the trial court that the evidence was being admitted for the limited purpose of illustrating the basis of the opinion, the court nevertheless refused to give a defense requested instruction to the effect that such matters were not direct evidence of value but could be considered in weighing opinion testimony. The error was compounded by other instructions given over timely defense objection that sales (of which there was no direct evidence) are the best evidence of

value. At the same time the court told the jury that before weighing the opinion of any witness it must find that the facts upon which it is based are true. Such instructions are conflicting and confusing and contrary to law.

Aside from the insubstantial basis for the verdict, each of the rulings of the trial court above indicated resulted in a denial to appellants of a substantial right and thereby deprived them of a fair trial. The verdict therefore should be set aside and a new trial ordered.

---

#### **SPECIFICATION OF ERRORS RELIED UPON**

1. The trial court erred in ruling without taking evidence, in excluding of its own motion defendants' proposed sale 2 and sustaining government objections to defendants' proposed sales 4, 5 and 6 as numbered and set forth in defendants' pre-trial list of proposed sales, C.T. 185, in rulings found in the R.T. 46, 55, 60, 62 and in overruling defendants' objections to government's proposed sales 4, 6 and 7 as set forth in government's proposed sales, C.T. 188, in court rulings found at R.T. 46, 55, 60, 62, 66, 199, 200.

2. The verdict is based solely or chiefly upon improper theories of law or assumptions of fact in that it is based upon the opinions of two witnesses whose opinions are founded upon two improper sales.

3. The trial court erred by denying to appellants the right to examine notes taken to the stand and referred to by government witness Rhodes in direct and cross-examination. The request and the ruling

thereon appears variously at R.T. 724, 725, 726, 751, 779, 780 and 785.

4. The trial court erred in denying appellants the right to cross-examine government witnesses concerning (a) the practice of the American Appraisal Institute where members appear on opposite sides to testify to disproportionate figures R.T. 483, 484, 485, 733, 735, and (b) in denying appellants an opportunity to cross-examine government expert witness Campbell on the subject of ethics mentioned in his direct examination, with respect to one incident where he attempted to create evidence while testifying as an expert witness for a condemning agency. R.T. 489, 490, 558-561.

5. The trial court refused to permit defense counsel to inquire of a government opinion witness concerning his compensation. The basis urged was the subject of bias and motive and in addition specific state of California statutory authorization. The ruling and the basis urged appear R.T. 732, 778, 779, 785.

6. The trial court struck the rebuttal opinion of defense witness Snelson to the effect that the subject land was far superior to the two sale properties urged by the two government valuation witnesses as closely comparable, although his qualifications were not questioned, on the grounds of improper rebuttal. R.T. 874, 875.

7. The trial court refused to give defendants' proposed instruction No. 16 despite the fact that much hearsay and otherwise usually inadmissible evidence was admitted as illustrative of the basis of the wit-

nesses' opinions. R.T. 424. Such proposed instruction reads as follows:

"In this case evaluation experts have been called by both sides, and have testified as to the factors considered by them in arriving at their opinion as to the market value of the land condemned. The factors considered by the expert are not in themselves direct evidence of the fair market value of the land condemned, but may be considered by you only for the purpose of determining what weight, if any, to accord to the testimony of the expert in his ultimate opinion as to the fair market value of the land in question as to the date of taking.

*United States v. Land & Drybed of Rosamond Lake*, Cal. 143 F. Supp. 314 at 322

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Judge"

Defendants' Proposed Instruction No. 16.

In addition, the court gave, over the objection that it constituted an improper comment upon the weight of the evidence, the following instruction:

"Bona fide sales of comparable properties may (made) within a reasonable time, before the date of the valuation of the property involved in this action are the best evidence of its market value. To the extent that other properties were actually comparable to the property involved in this action their sales are the best evidence indicative of its fair market value . . ." R.T. 945

The foregoing matters were properly and timely called to the attention of the trial court prior to submission of the cause to the jury. R.T. 956 et seq.

## I

**THE RULINGS OF THE TRIAL COURT WITH RESPECT TO COM-  
PARABLE SALES WERE ERRONEOUS. THEY PREVENTED  
APPELLANTS FROM FAIRLY PRESENTING THEIR CASE.  
(Specification No. 1.)**

The pre-trial order provided for an exchange of proposed sales, for written objections thereto and for a hearing and receipt of evidence thereon to take place on the Friday preceding the Monday on which the case was set for trial. C.T. 182, 183. Subparagraph (e) appears at line 15, C.T. 183 and reads as follows:

“The parties shall be bound by their respective lists of sales in that the witnesses for each side shall not be allowed to refer or rely upon any other sales as comparable sales in support of their opinions of value. A witness may, however, rebut or distinguish sales testified to by opposing witnesses.”

The interpretation of that language became the subject of dispute between respective counsel. R.T. 306, 310, 315, 320. Inasmuch as neither side made any effort to establish by competent evidence the facts of any sales but simply relied upon the hearsay testimony of its respective appraisal witnesses, it is apparent that the transactions were used by both sides in the same manner in which comparable sales were used in the case of *United States v. Johnson* (9 Cir., 1960), 285 F. 2d 35, where this Court said on page 41:

“The evidence of the so-called comparable sales in this case was not offered as substantive proof of the value of the property taken but only in support of the expert’s opinion as to value.”



To the same effect see *United States v. Baker* (9 Cir., 1960), 279 F. 2d 603, concurring opinion of Judge Merrill (p. 606-607).

No hearing was held before the trial. Instead, after selection of the jury, a hearing lasting one-half hour consisting solely of discussion between the Court and respective counsel resulted in the voluntary withdrawal of one government sale, R.T. 52, the exclusion of one landowner sale not previously objected to, the exclusion of three additional landowners' sales in accordance with government objection and rejection of all other objections.

The sales proposed, the objections interposed and the rulings are summarized as follows:

Defendants' Sales (in the order listed) C.T. 185	No. in Plaintiff's Objections		Ct. Ruling R.T. 46, 55, 60, 62
	No. on Sales Map Def. Ex. 2	C.T. 191	
1. Prine-Arnett	1		
2. Papst-Jobe	3		Court excluded
3. Gaskin-Fox	.....	1	Overruled
4. Erickson-Harper & Essix	4	2a	Sustained
5. Erickson-Harper & Essix	5	2b	Sustained
6. Davis-Harper & Essix	6	2c	Sustained
7. Michael-Newby	7	3	Overruled
8. Ball-Briggs	2		

Plaintiff's Sales (in the order listed) C.T. 188	No. in Defendants' Objections		Ct. Ruling R.T. 46, 55, 60, 66
	No. on Sales Map P. Ex. D	C.T. 190	
1. Finch-Lampley	.....	1	Withdrawn
2. Ball-Briggs	2		
3. Murdock-Whyler	1		
4. Parks-Sutfin	4	2	Overruled
5. Prine-Arnett	3		
6. Wilder-Boswell	5	3	Overruled
7. Wolfe-Petty	6	4	Overruled

Appellants respectfully contend that such rulings were arbitrary, in part based upon an erroneous conception of the law, and resulted greatly to the government's advantage.

**A. Slight Effect on Government's Case.**

Of the government's seven proposed sales, government witness Rhodes proposed to refer to the Finch sale but this was withdrawn by government counsel because the Court was willing to strike a defendant sale although not objected to as provided by the pre-trial order. Rhodes testified that the withdrawn sale was of little importance and did not affect his valuation. R.T. 804, 805.

As is more fully developed in Section II, commencing on page 18 hereof it is quite apparent that neither of the government experts placed any substantial reliance on nearby sales. Both relied primarily on Wilder and Wolfe sales which occurred 20 miles north of the subject property (R.T. 455) and both gave some weight to Parks. Overruling defense objections to Wilder and Wolfe without receiving evidence thereon, in light of evidence ultimately adduced in rebuttal, enabled the government to present each witness without handicap and to argue his opinion at length. That each opinion is firmly based on the two sales of property sold for purposes entirely foreign to the highest and best use of the subject property according to each government witness and therefore improper as a basis for valuation is set forth in Section II hereof.



**B. Substantial Adverse Effect on Defendants' Case.**

Reference to the landowner's sales map Exhibit One will disclose the proximity of the four excluded sales. The first Erickson sale No. 4 on the map is about 7 or 8 miles west of the subject property. The other Erickson sales and the Papst sale are about 4 or 5 miles west.

Defense expert Michael used two approaches to value. In one he assigned various amounts to various portions of the property. R.T. 106. Such approach is proper.

*Wilson v. United States* (10 Cir., 1965), 350 F. 2d 901, 904.

That portion of the subject property comprising approximately 167 acres of irrigated land was assigned a value of \$625.00 per acre by this witness. R.T. 299. In a stormy session outside the presence of the jury it was developed that the witness had come to the trial prepared to cite the two Erickson and the Davis sales as sales of irrigated land. R.T. 303. The witness claimed a general or common knowledge of irrigated land sales but was unable to cite any specific transactions other than these three which the Court had excluded. Government counsel took the position that the valuation opinion should be stricken because it was based at least in part upon such excluded sales. R.T. 308. Defense counsel argued that the meaning of the pre-trial order was that sales excluded by the Court were excluded as "evidence" and could not be cited or mentioned to the jury. R.T. 310.

Nevertheless this witness was severely handicapped in the presentation of transactions which in his opinion supported his valuation. The exclusion of these sales in close proximity to the subject property simply because they were of smaller size is in marked contrast to the rejection of defense objections to government sales Wilder and Wolfe of property some twenty miles away, which, as developed in Section II were not proper for comparative purposes.

It would appear that the three sales were stricken by the Court upon government counsel's statement that Sale 4 (Erickson) was of 80 acres, Sale 5 (Erickson) of 40 acres and Sale 6 (Davis) of 36 acres. R.T. 58, 59. The point is these were sales of irrigated land.

Although the subject property comprised 1139 acres only a small part was under irrigation. Defense witnesses reported as much as 167 acres under irrigation, R.T. 84, 299, while one government witness conceded only 77 acres. R.T. 412, 417.

Apparently, the Court was of the impression that simply because government counsel stated that these three sales 4, 5 and 6, were of small parcels that they must be excluded. R.T. 58, 59, 60.

The exclusion of defendants' Papst Sale No. 2 solely because it occurred four months beyond an arbitrary five year rule adopted by the Court was quite harmful. This nearby sale was the only sale having buttes as did the subject property making it peculiarly helpful for valuation, according to defense expert Michael,

R.T. 51, 199, but he was never able to use the sale or to explain it to the jury. The trial court was apparently of the view that there is an existing rule which forbids reference to sales of property which occur more than five years prior to the date of valuation. R.T. 51, 199.

On the contrary, however, the general rule seems to be that the amount of time within which sales may properly be considered depends upon the individual circumstances and to some extent the exercise of sound discretion by the trial court. Indeed, this Court has had occasion to rule that the inclusion of a sale made some six or seven years prior to the date of valuation was proper.

*Carlstrom v. United States* (9 Cir., 1960), 275 F. 2d 802, 809.

Cited in *Carlstrom* with approval is *United States v. Bechtold Co.* (8 Cir., 1942), 129 F. 2d 473, 479, which concerned a sale fourteen years before the valuation date. These sales were of the identical rather than similar property, but this fact would appear to be of no consequence under an arbitrary five year rule applied by the trial court herein.

In summary, it is respectfully contended that the court did not exercise discretion in excluding the four defendants' sales but on the contrary acted arbitrarily in so ruling and in refusing to receive offered evidence, R.T. 62, 199, as to the necessity of including such sales so that the appraiser might explain the reasons for his opinion.

In *United States v. Lowrie* (4 Cir., 1957), 246 F. 2d 472, the United States complained of the fact that its witness was not permitted to cite certain sales relied upon in forming his opinion. Two proposed government sales were there excluded on the grounds of lack of comparability, one a tract of land 63 acres in size compared to the property being valued of the size of 258 acres. That sale took place about two years before the date of valuation. The other excluded sale comprised 220 acres, a certain portion in cultivated land and woodland with certain improvements but not on a stream where the property being valued had approximately the same amount of cultivated land, woodland and improvements but was on an all year stream. It was held that the exclusion of such testimony was prejudicial error, the Court saying on page 474:

“In the instant case the evidence was offered to explain how the expert arrived at his conclusions, and it should not be overlooked that an expert witness is always subject to cross-examination, which may well be devastating, when it is shown that properties to which he refers are so dissimilar as to furnish no adequate basis for comparison. The exercise of the discretion should be made with these considerations in mind.”

The opinion continues that while the Court adheres to the rule of broad discretion being vested in the trial Court it holds that “the discretion is not absolute and may not be so exercised as to impede either party in an adequate presentation of his case.” P. 474. The Judgment was reversed.

The same principle is found in the earlier case of *Hickey v. United States* (3 Cir. 1953) 208 F. 2d 269, Cert. den. 1954, 74 S. Ct. 519.

The government was denied an opportunity to present opinion testimony concerning the cost of necessary alterations and repairs to the subject property by way of rebuttal to landowner's evidence thereon. The Court said on page 277:

“This resulted in limiting the government unduly in the prosecution of its case and constituted prejudicial error.”

Here it is the landowner who was unduly limited in the prosecution of his case. But the result, i.e., reversal, should be the same.

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## II

**THE VERDICT RESTS UPON THE OPINIONS OF TWO WITNESSES WHICH OPINIONS, BEING BASED UPON TWO IMPROPER SALES, ARE UNSUPPORTABLE.** (Specification No. 2.)

Where the verdict rests upon expert opinion which is based solely or chiefly upon improper theories of law or assumptions of fact, the verdict will be set aside.

*United States v. Honolulu Plantation Co.* (9 Cir., 1950), 182 F. 2d 172, 178;

*Likens-Foster Monterey Corp. v. United States* (9 Cir., 1962), 308 F. 2d 595, 597;

*United States v. Michoud Industrial Facilities* (5 Cir., 1963), 322 F. 2d 698, 706.



The verdict of \$155,000.00 herein clearly rests upon the opinions of government witnesses Campbell (\$155,000.00) and Rhodes (\$150,000.00).

Both of these witnesses based their valuation opinions chiefly, if not solely, upon two sales, Boswell-Wilder and Petty-Wolfe. Both said that the highest and best use of the Mallon property was for a year round livestock operation. Campbell R.T. 430, Rhodes R.T. 688, 765. Both regarded the Boswell sale as most comparable with Wolfe a close second. Campbell R.T. 457, 458, 540, Rhodes R.T. 701, 705, 715, 765, 766, 788.

Campbell said that the only difference between Boswell and the Mallon property was the cost of drilling a well R.T. 540. Rhodes said that the highest and best use of both Boswell and Wolfe lands were a year round livestock operation, the same as the subject property, R.T. 788 with the same capability. R.T. 788.<sup>2</sup>

Campbell obtained his information about the sale not from the buyer or the seller, R.T. 537, but from another government appraiser. R.T. 542, later confirmed by seller, R.T. 543. Rhodes spoke to the seller and to the broker but not to the buyer. R.T. 762.

*But these two properties were not sold for livestock or other agricultural purposes.* With respect to the Boswell sale D. M. McLemore testified as follows R.T. 821:

“Q. Mr. McLemore, where do you live?

A. Oakland, California.

\* \* \*

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<sup>2</sup>The record disclosing their near exclusive reliance on these two sales is further delineated in Appendix B.

Q. Parcel 5. And were you a purchaser of that property?

A. Yes, sir.

Q. And who besides you was a purchaser?

A. Robert Boswell; a fellow by the name of Jack Ronayene, R-o-n-a-y-e-n-e, who was a subdivider. He's from Concord.

Q. What is your business or occupation, Mr. McLemore?

A. I'm a mortgage loan broker.

Q. And would you tell me what knowledge you had about the property at the time you purchased it?

A. The knowledge that I had about the property was that it was about two miles from the city limits, city hall of Red Bluff. It was close to the sewer lines and utility lines. What we had in mind was we purchased that property for the sole purpose of subdivision.

Q. And how long a time did you study the property before purchasing it?

A. One day.

Q. I see. And did you have in mind or did you have any information which influenced your purchase of the property with reference to any new developments?

A. Yes. We bought it strictly on the idea that Aerojet was moving their moon rocket program over towards, in the area of Vina, and we surveyed the area by plane, contacted all the brokers in the area, and purchased the property, as I say, within one day, had our deed of trust with release clauses set up so we could subdivide certain sections of it, and we get automatic release clauses, and so forth.

Q. Now, can you tell us about the surface of the land that you purchased there?



A. Oh, I called it the Red Rock ranch.

Q. For what reason?

A. There's no grass on it. There's just no food. All it was was just——

Mr. Renda: Excuse me, your Honor, I have no objection to this witness testifying on the basis of his knowledge which he has. Now, if he is a livestock man and he is able to testify as to the type of feed that would be available for livestock ranches, I think he should be allowed to do so. But he has not indicated any qualifications to testify concerning feed values.

Now, if Mr. Blade can lay a foundation for it, I would have no objection to it. But until such time as he does, I move to strike this witness's opinion as to the feed quality of this ranch.

Mr. Blade: Well, I'm just asking the witness's knowledge of his own property from observation, your Honor.

The Court: The last part of his answer might be stricken."

With respect to the Wolfe sale, Mr. Wayne Petty testified as follows R.T. 861:

"Q. Your name is Wayne Petty?

A. Yes, sir.

Q. And where do you live, Mr. Petty?

A. Corning, California.

Q. And what is your business or occupation?

A. Petroleum wholesale and resale, is the primary business. I have some sidelines, but that is the main business.

Q. Petroleum wholesale and resale, you say?

A. Retail.

Q. Retail. Now, I'd like to call your attention to an exhibit, Plaintiff's Exhibit D, which is a

map of the area, including Corning, which I'm now indicating, which is in pink. North is to the top of the map. Highway 99 runs through the town of Orland, down through the town of Willows, and over in this general area that I'm now indicating is the subject property, the Mallon property, in the vicinity of the Black Buttes. Are you generally familiar with the area?

A. Yes.

Q. And, Mr. Petty—oh, I have not indicated the Town of Red Bluff, shown in the pink area here. And we show up here two irregular red areas blocked out: number 6, as I understand it, represents some property which was sold by Mr. and Mrs. Wolfe to you. Do you recognize that as the approximate location of the property which was purchased from Mr. and Mrs. Wolfe?

A. Yes, that is.

\* \* \*

Q. Mr. Petty, was that property purchased as a livestock operation?

A. No; no sir.

Q. And for what purpose was it purchased?

A. I purchased it as an investment, and I was particularly interested in that north section there because there's a mile and three-quarters of road frontage which I subdivided.

Q. Could we get the microphone a little closer to you so we'd be sure and hear you? You say there was a mile and a fraction of road frontage?

A. Mile and three-quarters.

Q. And you say after purchasing you did subdivide it?

A. I subdivided it, yes.

Q. All right. And have you since operated the entire property as a livestock operation?

A. No. I leased it out to various operators.

Q. And you say you subdivided how many acres?

A. About 135.

Q. And have you sold any portions of it?

A. I came out with 39 lots, and I think I've sold 10 of those lots; yes.

Q. At the time that you purchased the property, did you make any investigation as to the, well, the character of the property in respect to a livestock operation?

A. Not in respect to livestock or farming."

In *United States v. Michoud Industrial Facilities*, C.C.A. 5, (1963) 322 F. 2d 698, a similar principle was involved. There, the value of 1,000.22 acres of land improved with buildings having 1,767,000 square feet of rentable area were taken. The value was found by commissioners and the commissioners received the report of several experts. A review of the evidence satisfied the appellate court that the commissioners had adopted the opinion of one Mr. Lemarie; that Mr. Lemarie testified that the most comparable land was the land along the intracoastal canal at Harvey and that sales at Harvey were very largely the reason for his opinion of value; that Mr. Lemarie's opinion was supported by the sale of small tracts of land two or three acres fronting the Harvey Canal some fifteen miles distant. P. 706.

The Court said on page 706 that while it recognizes the general proposition that the appellate court would not interfere with the judgment of the trial court concerning the admissibility of sales whether remote

in time or size, that, nevertheless, such rule "falls far short of constituting a rule that the appellate courts may not reverse a finding of value which it finds to have been based on a comparison of the condemned property with other tracts which neither by location nor quantity of land involved or other characteristics bear any resemblance to each other in the market." The verdict was set aside, the judgment reversed.

In short, the appellate court found that the sales relied upon by the opinion witness were so dissimilar in distance and in size and character as to afford no reasonable basis to support the opinion and the verdict based upon such opinion therefore could not stand.

In this case, it is respectfully contended that the two sales, although twenty miles distant and arguably similar as to characteristics, nevertheless, cannot support the opinions of value of the subject property in view of the uncontradicted evidence that neither buyer bought with any thought of agricultural use because it is conceded by all parties that the highest and best use of the subject property is for a livestock operation and related agricultural activities.

The Court correctly instructed the jury: "The just compensation is the fair market value of the property taken." R.T. 944, and that fair market value "is the amount that in all reasonable probabilities would have been arrived at by fair negotiations between an informed owner willing but not compelled to sell and an informed purchaser willing but not compelled to buy." R.T. 946.

In the ascertainment of market value by the comparable sale method, not only must the sale properties have a reasonable degree of similarity, *United States v. Michoud*, supra, but no sale is admissible nor may any verdict based thereon stand if it appears that either party was acting under compulsion or force. See generally 5 Nichols on Eminent Domain 3rd ed., p. 461 et seq., para. 21.32 Forced Sales. For the same reason sales to a potential condemnor are not proper. Nichols, supra p. 465 et seq., para. 21.33 Transactions with Condemnor.

The necessity of excluding forced or compulsive sales where the goal is to ascertain what bargaining unaffected by force or compulsion would produce is clear.

It would seem equally clear that sales wherein one of the parties was not reasonably informed about the property or where one of the parties was misinformed in some major particular would likewise provide no guidance in ascertaining what bargaining between well informed persons would produce.

The principle is illustrated in the case of *Union Electric Co. v. Jones* (Mo.) 356 S.W. 2d 857. In this case a farm comprising 245 acres was condemned.

The court said on page 862:

“Appellants . . . assert that the trial court erred in excluding the testimony of James Sutterfield as to the price he received for his farm about seven months prior to the condemnation of the appellants' land. Sutterfield testified out of the presence of the jury that his farm was located



about 20 miles from appellants' land and that he sold it to the American Metal Smelting Company 'for mining purposes' . . . Here, there was no showing that appellants' land was adaptable for mining, yet the Sutterfield land was sold for mining purposes. . . . Here, appellants' offer of proof showed it was inadmissible. There was no error in rejecting it."

Had it ultimately developed that the sale property although thought to be suitable for mining was in fact, not suitable, the case would be almost identical. Here the most important sale (Boswell) was to a purchaser who understood that Aerojet was moving its Moon Space Program into the area, that the property was adjacent to the City with all utilities and that he and his associates who are in the subdividing business would subdivide it. It is difficult to conceive of a more clear case where property sold for purposes entirely foreign to the purpose which each expert witness claimed was the highest and best use of the subject property. It seems obvious that the poorest farm in the world might bring a handsome price if the purchaser believed, whether justifiably or not, that it contained a valuable attribute other than for agricultural purposes e.g., gold, oil or residential subdivision.

In the present case the verdict rests firmly upon the opinions of the two government witnesses who relied not upon sales in the immediate vicinity, but upon two sales of properties some twenty miles north on the outskirts of the City of Red Bluff neither of



which sold for agricultural purposes, as a measure of value. It is submitted that the verdict in this case rests upon no more firm foundation than did the verdict in the *Michoud* case. It should be set aside for the same reasons.

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### III

**APPELLANTS WERE DENIED A SUBSTANTIAL RIGHT BY THE TRIAL COURT WHEN IT REFUSED TO PERMIT THEIR COUNSEL AN OPPORTUNITY TO EXAMINE THE NOTES REFERRED TO BY GOVERNMENT WITNESS RHODES IN DIRECT AND CROSS-EXAMINATION. (Specification No. 3.)**

At the close of direct examination of government expert Rhodes defense counsel asked the witness if he could look at the notes which he had taken to the stand and to which he had referred in direct examination. The witness agreed. R.T. 724. However, government counsel objected. After some colloquy between the Court and respective counsel, the Court directed defense counsel to return the book to the witness. R.T. 726. Although the witness continued to refer to the notes and there was some discussion between Court and counsel from time to time, at no time thereafter was defense counsel permitted to see more than three pages taken from the book by the witness. It was developed from the witness that the book was a loose leaf book and contained approximately 30 pages including photographs, prints of maps and printed material. R.T. 728. It was further developed from the witness that he had testified to information reflected in the notes in addition to the

three sheets which defense counsel was permitted to see, R.T. 729, and that one of the two sheets was a page 8 of a report made by the witness wherein he listed sales which were not the same as those he had testified to. R.T. 730. In appendix A is set forth all of the testimony as well as the discussion between Court and counsel with reference to this matter.

No rule seems to be more firmly ingrained in the law than that where a witness has taken notes to the stand and has referred to them that the cross-examiner is entitled to see all of such notes, to cross-examine the witness thereon and in some instances to read them to the jury or to place them in evidence.

Although sustaining the trial court which had refused to permit defense counsel to examine a grand jury transcript which the Court had used to refresh witnesses' memory but which the witnesses had not been allowed to see, the Supreme Court, said in *United States v. Socony-Vacuum Oil Co.*, (1940) 310 U.S. 150, 84 L. ed. 1129, 60 S. Ct. 811, on page 1173 of the Lawyer's Edition as follows:

“Normally, of course, the material so used must be shown to opposing counsel upon demand if it is handed to the witness.”

The rule is set forth with numerous supporting authorities in:

58 *American Jurisprudence*, Witnesses p. 335,  
Sec. 601;

McCormick, *Law of Evidence* (1954) p. 17;

Wigmore on *Evidence* (3rd Ed.) Vol. 3 p. 108,  
para. 762.

The rule is part of the statutes of California. Section 2047 of the California Code of Civil Procedure provides that a witness may refresh his memory respecting any fact or any writing and continues:

“But in such case the writing must be produced, and may be seen by the adverse party who may if he choose cross-examine the witness upon it and may read it to the jury . . .”

In *Kelliher v. Ray* (1941) 43 C.A. 2d 252, 110 P. 2d 712, it was held reversible error to deny opposing counsel the right to inspect notes used by a police officer in testifying concerning his investigation.

Although confined to criminal prosecutions a similar principle is reflected in Section 3500(b), Title 18, U.S.C.A., Crimes and Criminal Procedure.

The appellate court of Illinois had occasion to rule on this matter in 1963 in *Justice v. Pennsylvania Railroad Co.*, 41 Ill. App. 2d 352, 191 N.E. 2d 72, where the general rule is stated and applied. A doctor had testified for one party and opposing counsel was refused permission to look at the notes on the grounds that they contained notes on treatment of other members of the family. The appellate court found this reason to be insufficient. The judgment was reversed. On page 74 of the N.E. 2d Report, the Court said:

“Whether or not anything else in his notes could have been used to discredit his testimony or weaken it, was a matter for counsel to decide, not the court.”

In *Fifth Avenue-Fourteenth Street Corp. v. Commissioner of Internal Revenue*, 2 Cir. 1944, 147 F. 2d

453, it was held to be reversible error to refuse to permit defense counsel to examine notes referred to by an appraisal witness where the issue of market value was an important factor. The Court said on page 458:

“... We think it was clearly improper to deny the request of the taxpayer’s counsel and that, in the circumstances, considering the high appraisal figure to which the witness testified and the importance of the valuation issue, there was an abuse of discretion in this respect.”

To the same effect:

*Jackson v. United States*, 5 Cir. (1958) 250 F. 2d 897, 900;

*Montgomery v. United States*, 5 Cir. (1953) 203 F. 2d 887, 894;

*Harris v. State of Texas*, Ct. of Crim. Apps. (1962) 358 S.W. 2d 130.

In two relatively recent cases in the Fifth Circuit Court of Appeals denial of cross-examination resulted in reversal. The inability to examine the notes obviously resulted in an inability to cross-examine the witness on the contents and therefore falls within the same general principle. In *Deglos v. The Fidelity & Casualty Company of New York*, 5 Cir. (1963) 313 F. 2d 809, the cause was reversed because under the rule there obtaining the appellant was compelled to call a person as a witness and examine him under direct examination rather than under cross-examination. The remarks of the appellate court with reference thereto apply with equal force herein. On page 813 the Court said:

“Our system of justice rests necessarily on the historic assumption that civilized moral people try their dead level best to tell the truth no matter how much it hurts or helps. But being a mechanism for the resolution of man’s disputes, the instrument of cross-examination is an integral part of that system in order to penetrate all of the conflicting impulses or obstacles to lay bare the whole truth. And yet from the nature of the strict procedural limitations imposed by the Judge, this could not be effectively done.

“Real cross-examination was entirely missing.

. . .

“This was not therefore the case of admission or exclusion of some bit of testimony asserted on appellate review to have been erroneous. This was the denial of the use of a tool of advocacy which our long judicial heritage marks as one of the most effective in the quest of truth. This was a substantial right. The experience of the bar is that it has substantial value . . .”

A similar ruling appears in *Delta Engineering Corporation v. Scott* (5 Cir., 1963), 322 F. 2d 11, 19, where the trial Court denied counsel an opportunity to cross-examine another witness on a subject with the admonition that it could be proved by that party’s own witnesses. On page 20 the Court said:

“Of course, this is a complete frustration of a major purpose of cross-examination . . .”

The decision was reversed.

In *Alford v. United States*, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624, it was held that sustaining an ob-



“Unless you are a member of the Institute, then there is really no governing control over a man who merely calls himself an appraiser. Is that correct?” R.T. 385.

The witness Rhodes testified that he is a member of the American Appraisal Institute and described the requirements for admission. R.T. 671-672.

The purpose of such statements is obvious. In order to refute them appellants attempted, by appropriate cross-examination, to establish that on various occasions members of such institute had opposed one another in Court, and had testified to vastly different figures without disciplinary action. However, the Court supported the objections of government counsel to such interrogation.

**B. Non-action of Institute in Specific Cases of Disproportionate Testimony.**

The subject first arose in the cross-examination of the witness Campbell. He was asked whether or not his opinion and that of another member of the institute differed in another case by over \$100,000.00. R.T. 483. Government counsel objected and the objection was sustained. R.T. 484. Government counsel made the statement in the presence of the jury that the other case was pending on appeal. Despite the fact that government counsel had successfully objected to any questions by appellants' attorney on this subject, government counsel asked for and received permission at that point to interrupt cross-examination and to go into the subject with the witness. The Court pointed



out that it was quite possible by so doing he would be "opening the gate". R.T. 485. The following questions were thereupon asked of government witness Campbell by government counsel:

"Q. Mr. Campbell, has a report been made to the institute concerning this discrepancy in the case Mr. Blade mentions?

A. Yes.

Q. Is it not a fact, sir, that they are reserving action until it is resolved by the courts?

A. True.

Q. And that it is entirely possible that action may be taken on either side depending on what the committee determines?

A. Right.

Q. Mr. Renda, that is all." R.T. 485.

Thereupon cross-examination continued and there was an effort made to find out the amount of the discrepancy when the government counsel again objected and this time it was pointed out that government counsel had opened the door but the Court said it would close the door, and prohibited any further questions on the subject. R.T. 486.

The subject again came up in the cross-examination of government witness Rhodes. He was asked if he had had occasion to appear and testify where an opposing member and he had testified to a difference of opinion as great as \$140,000.00. The objection was sustained. R.T. 733. When appellants' counsel attempted to find out if the figures differed as greatly as they do in the present case the Court interrupted and said the ruling precluded that. R.T. 735.

Trial in a case such as this is a contest between the conflicting opinions of expert witnesses. Here the government deliberately created an issue concerning the responsibility of expert witnesses epitomized in its counsel's statement: "Unless you are a member of the Institute, then there is really no governing control over a man who merely calls himself an appraiser."

One logical way to meet this issue would be to prove that on various occasions members of such Institute testified on opposite sides to vastly disproportionate figures *without* disciplinary action by such Institute.

This effort was denied appellants by the trial Court. Even more harmful was the willingness of the trial Court to allow government counsel to open the door for what he felt were necessary remedial statement-questions, and yet to close the door to defense counsel.

Thus, one side was allowed by self-serving testimony to discredit the witnesses for the other side. But the other side was denied an opportunity to defend such claims.

#### **C. Conduct of Campbell in Previous Trial. Non-action of Institute.**

Further to meet this direct testimony on cross-examination defense counsel attempted to ask government witness Campbell if he had while appearing as an expert valuation witness made an offer in open Court to purchase the property subject of valuation for the purpose of creating evidence and that no discipline had ensued. This effort was prevented by timely objection of government counsel sustained by

the trial Court. R.T. 489. Later, an offer of proof was made, R.T. 558, which was denied. R.T. 561.

It would seem that an expert witness testifying for a condemning agency would certainly exhibit dubious ethics in making an offer in open Court at a time when he was appearing as a so-called impartial expert witness, which defendants herein proposed to show. R.T. 558 et seq. Moreover, defendants further proposed to show that the incident had allegedly been reported to the appropriate members of the American Appraisal Institute who had absolved the witness of any criticism. R.T. 561. These two facts certainly tend to cast doubt upon the claims of high ethics made by this witness for members of said organization in his direct examination. They were properly for the jury to weigh but appellants were denied an opportunity to submit them to the jury.

#### **D. Denial of Cross-Examination Prejudicial.**

Full cross-examination on a subject opened up by the other side is a matter of right, the denial of which can constitute reversible error.

Thus, in *Quiles v. United States* (9 Cir., 1965), 344 F. 2d 490, a prosecution for narcotics and conspiracy, this Court said at page 494:

“A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right of a party against whom he is called.”

This Court cited the case of *Dixon v. United States* (5th Cir., 1964), 333 F. 2d 348, as authority for such statement.

With special reference to proceedings in eminent domain and the right of full cross-examination of opinion witnesses, see:

*United States v. 12.3 Acres of Land* (6th Cir., 1956), 229 F. 2d 587 (cross-examination denied. Judgment reversed);

*United States v. 679.19 Acres of Land*, D.C., 113 F. Supp. 590, 594 (cross-examination held properly allowed).

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## V

**THE TRIAL COURT ERRED IN DENYING APPELLANTS AN OPPORTUNITY TO INQUIRE INTO THE COMPENSATION PAID TO A GOVERNMENT EXPERT WITNESS. (Specification No. 5.)**

It would appear to be so fundamental as hardly to require citation of authority that a party may adduce evidence reflecting upon the motive, bias or interest of an adverse witness.

*McCormick on Evidence* (1954), Page 83, Para. 40, Bias;

Wigmore, *Evidence*, 3rd Ed., Vol. 3, Sec. 949, page 499;

*Cf. Fisher v. United States*, 9 Cir., 231 F. 2d 99, 104.

The problem is particularly acute where expert valuation witnesses appear and testify.

Section 1256.2 of the California Code of Civil Procedure provides:

“In any condemnation proceeding, either party shall be allowed to question any witness as to all expenses and fees paid or to be paid to such witness by the other party.”

When defense counsel inquired of government witness Rhodes as to his compensation for attending Court, an objection by government counsel was sustained and the Court ruled that appellant could not show what the witness was being paid for attending Court. R.T. 732, 785.

Rule 71A (a) provides that the Federal Rules of Civil Procedure “govern the procedure for condemnation of real or personal property under the power of eminent domain except as otherwise provided in this rule.”

An examination of the entire Rule 71A discloses no provision with respect to the admissibility of evidence. Hence, Rule 43(a) becomes applicable. It states that in any case, the statute or rule, i.e., federal statute or decisional rule or statute or decisional rule of the state wherein the United States Court is held, “which favors the reception of the evidence governs . . .”

The question concerning compensation is clearly admissible under the state statute and under the federal rules of civil procedure, admissible in this case. Government counsel, however, disagreed. At one point, R.T. 198, he advised the Court at line 13:

“If you (defense counsel) are going to cite state cases, I think we ought to have the authorities clear that state cases are in no way persuasive or binding upon this court in a federal matter . . .”



Again on page 782 he advised the Court that two named United States District Court Judges of this district "have now ruled that in their opinion no other rules of procedure are applicable to condemnation proceedings other than Rule 71 in connection with ascertaining value . . ." He also stated at line 14, R.T. 782:

"But in any event, the Department of Justice and the majority of the Courts now take the position that state statutes and state cases carry no weight or persuasion in connection with an eminent domain proceeding, save and except for the interpretation of what is law."

It may be conceded that insofar as provisions of state constitutions and state statutes on the general subject of eminent domain differ from the provision in the United States Constitution, that a federal Court would have to follow the federal constitution. However, it is difficult to see how a federal rule adopted by the United States Supreme Court which states that the most favorable rule concerning the admission of evidence shall govern, can be said to have no application to eminent domain cases where the same United States Supreme Court has in its Rule 71A (a) clearly set forth that all of the federal rules of civil procedure shall apply except as otherwise provided in such rule.

It may be conceded that government counsel has the authority to state that the United States Department of Justice has taken the position that the Federal Rules of Civil Procedure above set forth do not mean what they appear clearly to state. However,



at least several United States Courts do not agree. The decisions here cited, are not clear cut holdings for in each Rule 43(a) is cited in the footnote or by way of approval rather than as a compelling rule of law. Nevertheless, the principle therein stated is apparently approved and applied.

*Wolff v. Commonwealth of Puerto Rico* (1 Cir., 1965), 341 F. 2d 945;

*United States v. 25.406 Acres of Land* (4 Cir., 1949), 172 F. 2d 990.

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## VI

### THE COURT ERRED IN STRIKING THE OPINION TESTIMONY OF THE WITNESS SNELSON. (Specification No. 6.)

The defendants called Raymond S. Snelson as part of their rebuttal. R.T. 865. His entire life had been devoted to livestock and farming in Glenn and Tehama Counties. R.T. 866. At the time of the trial he was a tenant on the Boswell to Wilder property, R.T. 865, and had been since its sale four years prior thereto. He was familiar with the property before the sale having been a tenant on the adjoining property. R.T. 868. Such adjoining property was the Petty to Wolfe government sale where he was a tenant prior to the sale in February of 1960. R.T. 873.

The witness testified to familiarity with the Black Butte Dam area since 1934. R.T. 866.

With this background of a lifetime of farming and agriculture in the two adjoining counties, familiarity with the Black Butte Dam area for nearly thirty

years, occupation and tenancy of the adjoining government sale properties, Petty to Wolfe, for an undisclosed period prior to the sale in 1959 and the primary or chief government sale Boswell to Wilder for four years prior to the trial, the witness was asked to compare the two sale properties with property in the Black Butte Dam area for livestock purposes. R.T. 874. His answer is as follows:

“A. The Black Butte Dam area and all of that surrounding area is far superior to anything in the Red Bluff area as far as producing feed for livestock goes.”

Government counsel had previously objected to a similar type of question on the theory that it was calling for his opinion which he said was not proper rebuttal. Such objection was overruled. R.T. 874. Upon giving the answer above quoted, direct examination of Mr. Snelson closed.

Without further comment or objection on the part of government counsel, the trial Court then interrupted cross-examination to strike the opinion answer above quoted and admonished the jury to disregard it. R.T. 875, line 7.

This was not evidence which could properly be put in as part of the landowners' case in chief. Indeed, the landowners had objected to the two sales as being in an entirely different economic area some twenty miles away but the Court had arbitrarily overruled those objections in the hearing mentioned in Section 1 hereof. There was no mention of the two primary government sales Boswell to Wilder and Petty to

Wolfe in the landowners' case in chief. Obviously, therefore, it would have been improper to attempt to discredit the comparability of such two alleged comparable sales with the subject property until reaching the rebuttal stage.

It is to be noted that the objection was not made that the witness was not qualified. The objection was simply that the question called for an opinion and that an opinion on rebuttal is improper. Neither government counsel nor the trial Court, however, saw any objection to opinion testimony by way of rebuttal presented during the government's case. Thus, after presenting his appraisal of the subject property together with all of the reasons and factors behind it, government witness Campbell was asked for opinion testimony concerning landowners' sale No. 7 Michael to Newby. This sale was mentioned by landowner witness Michael in the course of his testimony supporting his opinion. R.T. 200-205, 272-275. It was not a sale mentioned or relied upon by either government witness. Nevertheless, Campbell was asked and expressed his opinion that that property was not comparable to the subject property. R.T. 469. In the same manner government witness Rhodes, after having testified at length concerning his appraisal of the subject property, had his attention drawn to a sale, not cited or relied upon by him, Gaskins to Fox, in Butte County. Rhodes expressed the opinion that the property was in a different area where speculation was going on and that it would not reflect market value of the subject property. R.T. 724.

It may also be noted that the landowner Mallon in expressing his opinion of value stated that in forming his opinion he obtained an estimate of the carrying capacity of his property and compared it to several nearby properties arriving at a sale price of approximately \$1,000.00 per animal unit carrying capacity and applied that measure to his subject property in forming his opinion. R.T. 109-110.

Throughout the testimony of government witnesses Campbell and Rhodes may be found expressions of opinion concerning carrying capacity on various properties and yet both witnesses disclaimed having placed any great reliance upon this method. R.T. 584, 801. Obviously, these opinions were expressed by way of rebuttal to the landowners' case. Indeed the government properly called the opinion witness Begg, R.T. 616, and others in order to rebut landowner testimony concerning carrying capacity on the subject property and on other lands.

Thus, repeatedly and extensively, the government was permitted to adduce opinion testimony designed to rebut the landowners' case in chief. Yet, the trial Court at the suggestion of government counsel struck the opinion of the obviously well qualified witness Snelson simply because it constituted an opinion concerning the quality and comparability of the two primary government sales to the subject property.

In *United States v. Hickey* (3rd Cir., 1953), 208 F. 2d 269 it was held reversible error to deny the government the right to present an expert witness concerning the cost of rehabilitating the property in view of

the fact that landowner expert witnesses had indicated that a rehabilitation or conversion was necessary to the highest and best use. (p. 276.) While it is stated that this was part of the government's case in chief it was obviously aimed as a rebuttal of the landowners' testimony and quite properly so.

Additionally, in *Hickey* the government expert testified about the poor condition of the plumbing and heating system of the subject property. After cross-examination the witness testified on re-direct examination that the witness had obtained additional information after the contractors had entered the building and begun certain construction work including the replacement of certain pipes which tended to confirm the witness' early opinion. However, the trial Judge struck the re-direct testimony. (p. 277.) The Court held:

"Storey's evidence on re-direct examination was admissible and should have been admitted. The ruling of the court striking it out constituted prejudicial error. The court refused to allow the United States reasonable latitude in proving this phase of its case." (p. 278.)

Moreover, as part of the landowners' case an expert had testified concerning two separate meanings of the phrases "market value" and "fair market value". To counteract this the government proposed to call an expert witness, a lawyer and a member of the Board of Assessors, to define the meaning of market value with relation to assessment but the Court refused to permit such testimony. The Court said on page 278:



“Under these circumstances the United States should have been allowed to present the evidence of the tax assessor in rebuttal.

“. . . The United States should have been allowed to rebut this inference, if it could. The exclusion of Steiger’s testimony seriously prejudiced the government’s case.”

It is clear, therefore, that where the government was not permitted to rebut important elements introduced into the case by the landowner in *United States v. Hickey*, prejudicial error resulted in a reversal. In this case, it is the landowner who was denied the opportunity to rebut the evidence given by both government experts concerning the high degree of comparability of the Wilder-Boswell and Petty-Wolfe sales to the subject property, the evidence as to which is set forth and delineated extensively in Section II and in Appendix B hereof. Striking this qualified witness’ opinion was therefore prejudicial to the landowners’ case.

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## VII

### THE COURT ERRED IN FAILING TO GIVE DEFENDANTS’ PROPOSED INSTRUCTION NO. 16, IN COMMENTING UPON SALES AND ON WEIGHING OPINION EVIDENCE. (Specification No. 7.)

The practice of allowing expert witnesses to testify as to the “reasons” for their opinion, including therein the results of their investigation, their conclusions with respect thereto and all of the factors considered by them in forming their opinion is well established



and is not contested. However, the extent to which such testimony includes hearsay sometimes two or three times removed, conjecture and speculation, is well known. The valuation witnesses for both sides gave such testimony extensively herein.

Defense counsel withdrew an objection to hearsay testimony upon the assurance of the trial Court that it was being admitted solely to illustrate the basis of the witness' opinion. R.T. 424. With this in mind defendants submitted Proposed Instruction No. 16 set forth in full supra page 10.

The proposed instruction was based upon the final paragraph in the opinion of Judge James M. Carter in *United States v. Land In Dry Bed of Rosamond Lake* (1956), 143 F. Supp. 314, 322 where he stated:

“As in all cases involving the opinion of the expert as to fair market value, the jury should be instructed that the factors considered by the expert are not in themselves direct evidence of the fair market value of the land condemned, but may be considered by the jury only for the purpose of determining what weight if any the jury accords to the testimony of the expert in his ultimate opinion as to the fair market value of the land in question as of the date of taking.”

This Court has stated that where evidence is admitted for a limited purpose the Court must give a proper cautionary instruction.

*Standard Oil Co. of Calif. v. Moore* (9 Cir., 1957), 251 F. 2d 188, 218-219.

The problem was compounded by the giving of an instruction concerning the superior evidentiary

value of sales without direct evidence thereof, *supra* page 10.

There was no direct evidence of sales. Except for rebuttal witnesses McLemore, R.T. 820, and Petty, R.T. 861, who were purchasers in two sales of disputed applicability, *supra*, Section II hereof, no participant in any sale testified. Such comments concerning sales were therefore improper.

*United States v. 5,139.5 Acres of Land* (4th Cir., 1952), 200 F. 2d 659, 662;

*United States v. Baker*, *supra* (9 Cir., 1960), 279 F. 2d 603, 606. (See also concurring opinion of Judge Merrill, pp. 606-607.)

But the Court also told the jury that "You must before considering the weight of the opinion of such witness first find from the evidence the facts upon which his opinion is based are true . . ." R.T. 949.

Thus, although allowing such extensive hearsay and other inadmissible testimony into evidence solely to illustrate the basis of the witness' opinion, R.T. 424, the Court not only refused to so instruct the jury although timely so requested, it effectively told the jury just the contrary for it singled out "evidence" of sales (though there was none) as superior for valuation purposes.

Then it completed the circle by telling the jury that before weighing the opinion of any witness it must find that the facts upon which it is based are true. Not only is this series of instructions confusing and misleading, it is contrary to law. It is more than an invitation to treat all of the hearsay, conjectural and

speculative remarks of various witnesses as “evidence” of the “facts”. It is virtually a direction to do so.

In view of the sharp conflict in the opinion evidence and the verdict returned it is submitted that such instructions were prejudicial.

*Trout v. Pennsylvania Railroad Co.* (3rd Cir., 1962), 300 F. 2d 826, 829. (Confusing and misleading instruction held to be prejudicial. Reversed.)

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### CONCLUSION

It is impossible to determine how the course of the trial might have been influenced had defense counsel been allowed to see the thirty page notebook taken to the stand by the witness Rhodes and referred to by him during direct and cross-examination.

Had the Court permitted evidence to be introduced at the start of the trial concerning the two sales located some twenty miles north of the subject property it is possible these sales might have been excluded, as they should have, and the course of the trial radically affected.

Had the Court not denied to appellants the other substantial rights herein noted, the right to rebut testimony exalting members of the appraisal institute and ethical conduct of its witnesses, the right to inquire concerning compensation, the right to present the qualified witness Snelson in rebuttal in respect to the above two sales, the course of the trial might well have

been altered. The same holds true of the errors in instructions noted.

For each and all of these grounds appellants request that the verdict be set aside and a new trial awarded.

Dated, Oroville, California,  
May 17, 1966.

Respectfully submitted,  
BLADE & FARMER,  
By ROBERT V. BLADE,  
*Attorneys for Appellants.*

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#### CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT V. BLADE,  
*Attorney for Appellants.*

**(Appendices A, B and C Follow)**

## **Appendices**





## Appendix A

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### Cross-Examination

By Mr. Blade:

Q. Mr. Rhodes, could I take a look at the notes you've been testifying from?

A. Yes.

Q. Okay.

Mr. Renda: Well, just a moment, your Honor, is Mr. Blade just going to leaf through these notes? If so, I'd like to have a copy of Mr. Michael's notes and Mr. Smith's notes. I think he certainly has a right to question this man on anything that he's referred to, but I don't think he has a right to just take the notes and take it back to his table.

The Court: I don't think so either.

Mr. Blade: I didn't hear what he said.

The Court: I don't think that you should take the notes.

Mr. Blade: It's my understanding of law, your Honor, when a witness is using his notes that he's been referring to opposing counsel has the right to look at them.

The Court: That part of the notes he's testified to, you may have him show you.

Mr. Blade: This is all I know just what he handed me and what I saw him leafing back and forth through the notes.

The Court: He might have some letters in there.

Mr. Blade: You get the whole package, as I understand the law. You don't just get a single line or a single page.

The Court: You don't just take in the whole country. He may have a love letter in there, you can't tell.

Mr. Blade: I would assume he didn't take the love letter to the stand, but I don't think I can get half a statement or half a sentence.

The Court: You can question him about any one of the notes but not take the book as a whole.

Mr. Renda: Excuse me, Mr. Blade. Did you hear the Court?

Mr. Blade: Well, if your Honor please, I can't even ask a question about the notes unless I first take a look at them.

The Court: Well, if you don't know what you want to ask, the notes won't be any good to you.

Mr. Blade: I'll know when I check them.

The Court: You may return the book to the witness.

Mr. Blade: Very well, your Honor.

The Court: I won't preclude you from having notes on any one of these matters that he's testified to.

Mr. Blade: All right. We'll start at the beginning, first page.

Mr. Renda: I object, your Honor. He's going through the whole book.

Mr. Blade: Just a moment, I'd like to ask my question first. If your Honor please, as I understand your Honor, I can find out from the witness every note he testified to, and as to that I can look at it. Is that your Honor's ruling?

The Court: Yes.

Mr. Blade:

Q. All right. Mr. Rhodes, have you testified to anything on the first page?

A. No.

The Court: Well, now, I'll sustain the objection. Just ask him about the ones he has. You're going right through the book page by page. Understand what I mean?

Mr. Renda: If your Honor please, so the record is straight, I have no objection to Mr. Blade just taking that book entirely and looking at it on the assumption that Mr. Michael furnishes me his notes so I have the same opportunity, and Mr. Smith furnishes his notes.

Now, they all had notes, and I asked them when a particular question came up as to what they were referring to, and I have no objection to Mr. Blade doing the same thing. Those are Mr. Rhodes' notes and if he wants to give them to him, certainly he may do so, but I think that properly Mr. Blade should ask him as to those matters which he has testified to, and if Mr. Rhodes again wants to give it to him to look at it at recess, that's up to Mr. Rhodes.

Mr. Blade: Well, if your Honor please——

The Court: Well, you're chasing a rainbow. You know the ranches that he's testified to. You can ask him to show you the notes on that particular ranch.

Mr. Blade: Well, first, I'll ask him to testify about the notes on the Mallon ranch. Will you show me the notes on the Mallon property?

The Witness: Your Honor, I have no notes here that I didn't refer to in my testimony. Now, in showing these notes, should that just be the notes that I referred to?

The Court: Just the notes you referred to in your testimony.

It might save time if you give him all the notes on those matters you actually testified to.

The Witness: That's what I'm actually doing, your Honor.

The Court: All right.

The Witness: I don't think I referred to anything but just these two.

Mr. Blade: All right. For the sake of the record, your Honor, may I establish the size and general extent of the notes which I'm being denied the opportunity to read and examine the witness on?

The Court: I don't know what you want to do, but go ahead and do it.

Mr. Blade: All right.

By Mr. Blade:

Q. Mr. Rhodes, you have taken out of this looseleaf book two sheets of paper in response to the Court's suggestion, and there remains, can you tell me approximately how many pages of typewritten material that you had at the witness stand during the course of direct examination which is not being made available to me?

A. There are some typewritten in, also others that are prints of maps, and I would say there are roughly 30 sheets.

Q. And you have photographs?

A. Yes.

Q. And some of this printed material, I take it, is the same as went into the written report which you turned into the Government?

A. Yes. In fact, all of that material is right here that went into that report.

Q. And is the figure which you testified to today reflected in your notes?

A. Yes, it is.

Q. And is it on these two pieces of paper?

A. No, it isn't. I had that—I remembered that figure. I didn't have it to refer back to, and I don't believe it is; no.

Q. The valuation figure is not on the notes, the two pages, that you've made available to me, is that correct?

A. No.

Q. Is it on the notes that you have in front of you?

A. Yes, it is. The first is the letter of transmittal with my report. This sheet was a summation or compilation of my sales data, which had many numbers and figures; hard to remember them all. And the other one was a sheet I made in getting information on the Gaskin to Fox sale.

Q. Well, I take it then, if I'm to ask some questions on these two sheets of paper, insofar as my questions are the same general questions which were asked of you during direct examination, it would be entirely unnecessary for you to refer to your notebook to answer them, is that right?

A. If you asked the same questions, that's true. I don't think I'd have to refer—

Q. Yes. Now, this first sheet has a number 8 on it. I assume this is a page 8 out of a report that you submitted, is that right?

A. That's correct.

Q. All right. And do I understand that the sales which you listed in this report are the same sales to which you've testified today?

A. I have testified to sales listed on that page, yes.

Q. All right.

A. However, you asked if they were all the same, and my answer there would be no.

(Recess.)

By Mr. Blade:

Q. Mr. Rhodes, before the recess we discussed briefly the first sale, the Murdock to Whyler sale, and you said you got some carrying capacity from Mrs. Espel, and what was that?

A. I believe that was one thousand—wait a minute, I'll check. As I stated, I gave very little



reliance on the carrying capacity method, and did not use that as my principal amount. It's 1,000 sheep for six months.

Q. And you got that information from the looseleaf book in front of you?

A. Yes.

Q. All right. I just wanted to get that into the record. And you concluded then the carrying capacity of that property to be what? Did you make a conclusion as to its carrying capacity?

A. Only a rough conclusion; something around 100 to 107 animal units. Again, as I say, I did not rely on that as my basis of value.

The Court: You may have those notes if you want them.

Mr. Blade: The ones that he just looked at?

The Court: Yes.

Mr. Blade: Thank you, your Honor.

The Court: I'm saying that on account of my other ruling.

The Witness: You want the ones I just looked at?

Mr. Blade: Yes, that's the way I understand the Court's ruling.

Mr. Renda: May I have an opportunity to see these, too, your Honor?

The Court: Yes. I want to make myself clear. Any matters that he testifies to that he has notes on counsel for the defendant is entitled to see the notes.

Mr. Renda: Yes, your Honor. I understand that.

Mr. Blade: All right. Thank you.

Mr. Blade: If your Honor please, I wanted to ask the witness one or two questions outside of the presence of the Jury in keeping with what I



understand to be the rulings before the Jury was impaneled.

Cross-Examination (Continued)

By Mr. Blade:

Q. Mr. Rhodes, on page 8, which you have allowed me to examine, there is the Finch to Lamphley sale, given as a date of 12/1/55, and this sale was included as the fourth in the series of seven sales on that page, is that correct?

A. Yes.

Q. And there's the word written out. I take it that was written on there after you were informed that the sale had been withdrawn by Mr. Renda as a sale to be used in this case?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir. It's my understanding that the Judge ruled the sale out on the basis of time.

Q. And I take it insofar as making your appraisal is concerned, this was one of the sales that you took into consideration and relied upon in arriving at your opinion of market value of the subject property?

A. I considered it. However, I gave it the least weight of any because it was so old.

Q. So old? The least weight of all of them?

A. Yes.

Mr. Blade: All right. That's all I wanted to ask of this witness at this point.

The other rule that I had in mind was the examination of notes. And I'll have to dig up some evidence on that. But I do feel that I can satisfy your Honor that this is a well-established rule of law, at least in California, that where a witness is referring to notes, opposing counsel is entitled to

see all of them, not just the ones he looked at or said he looked at, but all that he takes to the stand with him. So if he says on page 1, fact so-and-so, and the examiner finds that over on page 10 that he's got a note to the contrary, he's entitled to ask him about it.

The Court: There's no question but what you're entitled to ask him about it, but not on something that he hasn't used.

Mr. Blade: That's correct, your Honor.

The Court: You can take his whole office file, you can have him bring all his records from his office——

Mr. Blade: Well——

The Court: —and everything, and look at everything that he's got. Now, I rule that you can have any note that he has used in connection with his appraisal on this property that he testified to on his direct examination, and I think that's as far as I should go.

Mr. Blade: Well, if your Honor please, maybe I misunderstand. It's my understanding that when the witness takes a book, a series of notes, to the stand with him, that the rule I'm talking about certainly doesn't apply to his office or some place else, but it does apply to that which he takes to the stand and actually refers to. If he doesn't open it, why, of course, he hasn't referred to it. It's impossible for me to say, or anyone, whether it's page 1 or page 10. That's why——

The Court: You can ask him if he has any other notes on the subject that he's testifying on.

Mr. Blade: Yes.

The Court: If he says he has, you can have the notes.

Mr. Blade: But my first point is, my understanding it, that having taken the book to the stand and referred to it in the course of direct examination, that I'm entitled to examine it. And I didn't get a chance to examine it because, as I understood your Honor's ruling, only those pages that he was willing to pick out, which constituted just two, was I able to look at. Now, that's the way I understood the ruling. And I abide by it. But I think I'm entitled to look at the entire book as long as he took it to the stand and referred to it.

Mr. Renda: Have you finished now, Mr. Blade?

Mr. Renda: Now, on the notes—and this is legal argument rather than to Mr. Rhodes—first of all as to the most liberal rule applicable—I know the rule to which Mr. Blade refers; it's rule 41B, and it is to be read in connection with Rule 71—however, let me point out to the Court that there is a great deal of disagreement about whether or not any rules of procedure other than that which are specified in Rule 71A of the Federal Rules of Procedure are applicable in Condemnation proceedings, because I'm sure the Court is aware there's a distinction between substantive and procedural law. And, as a matter of fact, Judge Carter and Judge Halpert of this district have now ruled that in their opinion no other rules of procedure are applicable to condemnation proceedings other than Rule 71 in connection with ascertaining value, and that refers to what Mr. Blade is pointing out here.

Now, the third point as to the notes, I think the record here should reflect that first of all Mr.

Michael and Mr. Smith, who were the witnesses for the Defendants, appeared on the stand with looseleaf notebooks, sheets of paper, and periodically throughout their testimony, both direct and cross, they would reach into pockets and pull out little pieces of paper. Now, I had the right, I am certain, if I desired, to look at individual pieces of paper to which they were referring in response to a question. However, I did not feel that necessary, and I did not call upon the witness to allow me to do that. Certainly I had no right to ask him to empty their pockets to show whatever they had in that looseleaf notebook, and let me sit down before I cross-examined them, and look through it all before I asked a single question. Now, I think the record should reflect in that case that Mr. Rhodes has before him a looseleaf binder in which there are obviously some loose papers. There are some papers in the binder, and he has already testified as to the nature generally of what is contained therein. Now, there is included in there, I'm certain, some matters that were not testified to on direct, and might have been referred to on cross-examination. If they were not referred to on direct and not referred to on cross-examination, Mr. Blade has no right whatsoever to those notes. And I think that the Court's ruling is fully and entirely proper in the circumstances, and I think we are in clear understanding that any document to which Mr. Rhodes refers in his direct or cross-examination, Mr. Blade has the right to read and observe, but certainly he has no right to take all the documents that this witness happens to have on the stand with him at this time.

Mr. Blade: Well, I might answer counsel first, your Honor, with reference to Rule 71, counsel has referred to Judge Carter, who has made some ruling, he says. Judge Carter has specifically sustained the asking of the question of compensation of an expert witness. Now, whether he does that because he recognizes that the state rule of procedure, controls, or for some other reason, I don't know. But Rule 71 simply says that except as otherwise provided in this rule, the rule, the remaining civil rule, shall apply, and the literal application of the rule, of course, clearly requires the procedural rules of the State, and the procedure that counsel states, substantive procedure, does exist. The line of demarkation is not always too clear, but certainly in the admission of evidence and the asking of questions, it seems they are clear.

Insofar as examining the notes are concerned, I can't help what kind of notes were taken to the stand. All I know is, as I always understood the rule, if a man takes a series of notes to the stand and riffles through them, you're entitled to see them.

Now, I don't want to hold your Honor any longer.

The Court. No. I'm not changing any of my rulings that I've heretofore made.



## Appendix B

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### RELIANCE ON TWO RED BLUFF SALES

The relative insignificance to the government experts of all government sales except the two Red Bluff sales is illustrated by the sales price per acre as compared to their opinions per acre of the subject property.

	Per acre
1. Whyler	\$ 35.00
2. Briggs	\$ 54.00
3. Arnett	\$ 71.00
4. Sutfin	\$ 96.00
5. Boswell	\$118.00
6. Petty	\$100.00
Mallon Property	\$135.00—Campbell \$131.70—Rhodes

Campbell's valuation report to the government mentioned only sales 4, 5 and 6, sales 2 and 3 being added for the purpose of trial testimony. R.T. 494.

With reference to sales two and three government witness Campbell said as to Ball to Briggs that it represents the lower limit of value having no irrigated land as on the subject property and that the subject property would sell for "much more". (R.T. 441. Government witness Rhodes stated that there was no irrigated land and that it was much larger and was a winter range ranch. R.T. 699. This witness described the highest and best use of the subject property as a year round livestock ranch. R.T. 688, 765.

Sale No. 3, Prine to Arnett, was referred to by Campbell as low in quality with no irrigated land as



on the subject property; that Mallon being partially irrigated would sell for more. R.T. 446. Rhodes described it as a basically winter range with no irrigation. R.T. 699.

Government sale No. 4 Parks to Sutfin was referred to by Campbell who said after having referred to the previous two sales more by way of contrast than by comparability, that for the first time we are beginning to get toward a sale which tends to be more comparable to the Mallon property. R.T. 448. However, he regarded it as inferior with reference to the irrigated area. R.T. 449. Rhodes simply stated that it was more smooth. R.T. 700.

Campbell did not refer to government sale one, Whyler. Rhodes did. He said that it was not as good as the subject property, R.T. 693; did not have the attributes of the subject property and used it only for background as it was of much less value. R.T. 695.

On the other hand, Campbell said that Boswell, sale five, is 20 miles north of the subject property but that the only difference in the quality of that property to the subject property was the cost of putting down a well. R.T. 457. He referred to it as "most comparable as to size and use but inferior but getting pretty close". R.T. 458. He asserted that the range was identical to the subject property. R.T. 452. Rhodes said that the highest and best use of this property was for a year round livestock operation. R.T. 766. He said sales one, two and three are less reliable as indicators of value because the differences with the subject property are greater. R.T. 711. However, as to the sale five, Boswell, he described this as the "best sale" with

the other two sales (Wolfe to Petty and Parks to Sutfin) tending to confirm it. R.T. 715. He added that in reaching his value he placed primary weight on these three sales, four, five and six. R.T. 717. He gave the greatest weight to sales four, five and six because of the existence of irrigated land. R.T. 757, 786. He also said that the Boswell sale five was an economic unit, i.e., capable of supporting a person without outside lands, R.T. 767, and made the same comment as to the subject property. R.T. 766.

Campbell made the statement that a buyer would consider that by simply placing a well on the Boswell property it would become equal to the subject property. R.T. 540. Rhodes stated of Boswell that it was a good indicator of value and it was property that would be considered by the same type of purchaser. R.T. 705.

Campbell described the Wolfe to Petty—government sale six as comparable. R.T. 458. He admitted that there was a strawberry patch under irrigation, R.T. 460, that it had a poorer quality range than the subject property, R.T. 461, and that he treated the strawberry patch as though it were the same as irrigated pasture. R.T. 462. Rhodes said of this property (Petty) that a purchaser would consider it along with the subject property as having some irrigated land and some dry land. R.T. 706. He stated that it was a “good indicator of value” and that a buyer in the market would consider this property also if looking for a ranch of the type of the subject property. R.T. 709.

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FEB 14 1967

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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J. D. MALLON, ET AL.,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

---

BRIEF FOR THE UNITED STATES

---

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FILED

OCT 3 1966

WM. B. LUCK, CLERK





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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

No. 20444

J. D. MALLON, ET AL.,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

---

BRIEF FOR THE UNITED STATES

---

OPINION BELOW

The district court did not write an opinion. Its  
judgment appears at pages 196-203 of the record. <sup>1/</sup>

JURISDICTION

The district court had jurisdiction of this federal  
condemnation action under 28 U.S.C. sec. 1358. Final judgment

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<sup>1/</sup> Volume 1 will be designated "R," while the transcript of  
evidence will be designated "Tr."

was filed on October 31, 1964 (R. 196). Appellants' timely motions for new trial and to amend the judgment were denied on March 15, 1965 (R. 204, 214, 248). On Friday, May 14, 1965, appellants dated a notice of appeal, which was marked received and filed by the clerk of the district court on Monday, May 17, 1965 (R. 249). For reasons discussed at pp. 11-15 of this brief, the notice of appeal was not timely filed and this court lacks jurisdiction to review the judgment which it would otherwise have under 28 U.S.C. secs. 1291 and 2107 and Rule 73(a), F.R.Civ.P.

#### QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction because the notice of appeal was untimely filed.
2. Whether certain of appellants' sales were correctly excluded.
3. Whether the Government's Wilder-Boswell and Wolfe-Petty sales were proper bases for the value opinions of Campbell and Rhodes.
4. Whether the district court in its discretion soundly limited cross-examination into the following collateral matters:

- a. Membership in and practice of the American Institute of Real Estate Appraisers; and
- b. Compensation of government witness Rhodes for his appraisal services.

5. Whether inspection of appraisal notes not con-

sulted by Rhodes in his testimony was properly withheld.

6. Whether the rulings on the striking of an un-

responsive answer of rebuttal witness Snelson and on the instructions were correct.

#### STATUTE AND RULE INVOLVED

28 U.S.C. sec. 2107 provides in pertinent part:

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

\* \* \* \* \*

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

\* \* \* \* \*

Rule 73, F.R.Civ.P., Appeal to a Court of Appeals prior to the 1966 amendments, which are not relevant here, provided in pertinent part:

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

\* \* \* \* \*



## STATEMENT

In March 1960, the United States condemned specified interests in approximately 3,595 acres, which included the fee title to 1,139 acres (Tract 104) owned by appellants, for use in the Black Butte Dam and Reservoir Project, in Tehama and Glenn Counties, California (R. 1, 19; Tr. 66). A declaration of taking was filed with the complaint.

Improvements of Tract 104 included an unoccupied ranch house, a cabin, three barns, two sheds, a storeroom, some fencing, and water pumps (Tr. 68, 101, 156-159, 213, 221-222, 393-395). The property had both irrigated and dry pasture land. Its historical use was for a livestock operation, which all valuation witnesses regarded as the property's highest and best use (Tr. 82, 165-166, 359, 428, 430, 675, 688). Stoney Creek, a stream which eventually emptied into the Sacramento River, divided the property into northern and southern portions of almost equal size; the stream itself accounted for some 170 acres (Tr. 405, 420, 630). On the southern portion of 488 acres (Tr. 791), 90 acres, which had no feed production history, could have been irrigated on the date of taking by a sprinkler system

installed in 1959 (Tr. 84, 107, 136, 407, 464); while on the northern portion, 77 acres had been flood-irrigated by pump from the creek, making a total of 167 of the 1,139 acres which had an irrigation history or potential (Tr. 84-85, 401-403, 630-631). Lava rock cap was described as covering some 200 acres on the buttes, prominent landmarks on the property (Tr. 426-427, 629-630, 677, 714).

The valuation testimony ranged as follows (Tr. 108, 205-207, 359, 463, 691):

For Appellants:

Valuation:

James D. Mallon (landowner)	\$330,000
Walter H. Michael	307,000
Justin E. Smith	295,000

For the Government:

Bert Campbell	\$155,000
Richard M. Rhodes	150,000 <u>2/</u>

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2/ In addition to sales of other properties, there was extensive, conflicting testimony concerning animal units and carrying capacity of Tract 104 as well as the sales (Tr. 88-97, 109, 134-135, 147-149, 184, 191, 193, 208, 227-234, 402, 428, 432, 434-435, 442, 444, 450-451, 462-465, 505, 525, 584, 603-615, 616-664, 696, 751-756, 800-801, 813-816, 832-842); soil analyses and comparisons (Tr. 160, 164, 170-179, 182, 192, 222-225, 265, 395-400, 404, 406, 426-427, 447, 468, 527-528, 603-615, 616-664, 813-816, 828); and usefulness of the tract as a whole including difficulty in moving livestock across Stoney Creek from one portion of Tract 104 to the other and use of adjoining property not owned for such access purposes (Tr. 247, 329, 342, 348-352, 405-406, 428-430, 682-685, 788-789, 827, 845-847).



The jury verdict was in the amount of \$155,000 (R. 195; Tr. 962). Judgment was entered thereon (R. 196-203), and appellants' motions for new trial, to vacate the verdict, and to amend the judgment were denied (R. 248). This appeal followed (R. 249). To avoid repetition, other details of the proceedings will be developed in the Argument section.

### SUMMARY OF ARGUMENT

#### I

Jurisdiction of this appeal is lacking because the notice of appeal was not timely "filed." On the last possible day for filing a timely notice of appeal, appellants "dated" a notice of appeal which was marked "received" and "filed" by the district court clerk three days later. There is now no showing in the record of any circumstance which would change the date for filing a timely notice of appeal. On this state of the record, the appeal should be dismissed for lack of jurisdiction.

#### II

Even if jurisdiction were not lacking, consideration of the merits shows that the judgment below should be affirmed.

A. Comparable sales are the best evidence of value.

Whether a sale is comparable is a matter for the discretion of the trial court. Here, the district court, in an exercise of its discretion, properly excluded prior to trial certain sales proposed to be used by appellants because the sales were either remote in point of time or physically dissimilar. The date of taking of Tract 104 was March 1960 and one of appellants' proposed sales occurred in 1954. There were other more recent sales regarded by the valuation witnesses as comparable. Three of appellants' proposed sales were physically dissimilar in that they involved, among other factors, 36, 40, and 80 acres respectively, whereas Tract 104 consisted of 1,139 acres. No abuse of discretion resulting in prejudice is shown from the district court's rulings.

B. The Government's Wilder-Boswell and Wolfe-Petty sales were admissible as one of the bases for the value opinions of the Government's witnesses, Campbell and Rhodes. These sales were the most comparable of the sales in evidence, as to time, location, use, and adaptability. That the properties were purchased for a use (potential subdivision) different from

the highest and best use of Tract 104 (ranching) is not legally disqualifying. Each seller evidently received his asking price and there was no evidence that there was a market which would have paid more. Indeed, sales prices of properties purchased for potential subdivision are generally higher than those paid for ranching.

C. The district court's miscellaneous rulings on the extent of cross-examination, rebuttal testimony and instructions were correct.

1. The district court validly confined cross-examination ~~into~~ membership and practice of the American Institute of Real Estate Appraisers. Membership and practice were collateral subjects and "such supervision of cross-examination, and its curtailment when over-extensive, lies precisely within the discretion granted the trial court in such matters." Carlstrom v. United States, 275 F.2d 802, 808 (C.A. 9, 1960).

2. Inquiry into the compensation of government witness Rhodes for his appraisal services was also properly restricted for three independent reasons. First, appellants were not unduly restricted. The fact of payment was permitted

to be shown. Second, such compensation was collateral to the issue in the case, the amount of just compensation owing the landowners for the taking of Tract 104. As a collateral matter, the extent of examination into it was addressed to the discretion of the trial judge. Third, admissibility of evidence is governed by federal, not state, law. Since the issue in this federal condemnation proceeding is just compensation under the Fifth Amendment, the California statutory law of evidence is not applicable.

3. These same reasons support the district court's ruling that appellants were not entitled to examine appraisal notes not consulted by government witness Rhodes in his testimony. In addition, the rule urged by appellants is inappropriate to notes of mental calculations and processes, such as an appraisal report. Also appellants were permitted to examine everything referred to by Rhodes in the course of his testimony.

4. Appellants misread the record in charging that Snelson's "opinion testimony" in rebuttal was stricken and that they were prevented from rebutting the comparability of two sales relied upon by the Government. Only a single



sentence was stricken, without objection or further action by appellants. The answer was unresponsive and concerned a matter not placed in issue by the Government's case. Moreover, the record shows that appellants explored fully with Snelson his opinion as to the comparability of the sales.

5. The rulings on the instructions were well founded. The district court instructed the jury that comparable sales were the best evidence of value. This was clearly correct, as was the instruction to assess the bases of an expert's opinion in determining the weight to be assigned the opinion. Objection to the latter was withdrawn by appellants.

Considered together, the instructions apprised the jury of that part of appellants' proposed instruction which was applicable to this case. The district court was not obliged to give appellants' proposed instruction literally.

#### ARGUMENT

##### I

#### JURISDICTION OF THIS APPEAL IS LACKING BECAUSE THE NOTICE OF APPEAL WAS NOT TIMELY FILED

The time provision in 28 U.S.C. sec. 2107 and Rule 73(a), F.R.Civ. P., supra, pp. 3 - 4, for the filing of a notice of appeal from a district court judgment to a court

of appeals is mandatory and jurisdictional. In United States v. Molitor, 337 F.2d 917, 920 (1964), this Court said: "It is well established that a notice of appeal must be timely filed so as to confer jurisdiction upon this Court to consider such appeal. [Citations omitted.] Molitor's cross-appeal [filed 67 days after entry of judgment and seven days after the United States filed its appeal] must be and is hereby dismissed on the ground that this court is without jurisdiction to entertain it. \* \* \*" An affidavit, stating that a notice of appeal delivered to a postal clerk on the last possible effective filing day (March 20, 1957) for transmission and delivery to the district court clerk and that the notice could and should have been delivered to the clerk that same day, was rejected, in Allen v. Schnuckle, 253 F.2d 195 (C.A. 9, 1958), where the notice was filed March 21, 1957, one day late. This Court noted (at 196-197): "The affidavit does not state, nor does it otherwise appear, that the notice was, in fact, delivered to or received by the clerk on March 20, 1957. Delivery thereof to a post office employee did not constitute a filing." Accord, Kahler-Ellis Co. v. Ohio Turnpike Commission, 225 F.2d 922 (C.A. 6, 1955); Lejeune v. Midwestern Ins. Co. of Oklahoma City, Okla., 197 F.2d 149-150 (C.A. 5, 1952); but see Ward v.



Atlantic Coast Line R. Co., 265 F.2d 75, 80-81 (C.A. 5, 1959), rev'd on other grounds, 362 U.S. 396, the court holding the notice was timely filed where the notice was mailed so as to reach the clerk seasonably and was in fact "received" but not marked "filed" because of the clerk's absence. <sup>3/</sup>

In the case at bar, appellants' notice of appeal was not timely filed. Final judgment was filed on October 31, 1964 (R. 196). Appellants' motions for new trial and to amend the judgment were dated and mailed to government counsel November 10, 1964, and marked "filed" by the clerk November 13, 1964 (R. 204, 206, 213, 214, 218). The motions were thus timely "served" under Rules 5(b) and 59(b) and (e), and the running of the time for appeal terminated pursuant to Rule 73(a). The time for appeal under the express language of Rule 73(a) commenced

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<sup>3/</sup> See also Lord v. Helmandollar, 348 F.2d 780, 782 (C.A. D.C. 1965), cert. den., 383 U.S. 928; Thomas v. United States, 328 F.2d 607, 608 (C.A. 9, 1964); Smith v. Stone, 308 F.2d 15, 16 (C.A. 9, 1962); Mondakota Gas Co. v. Montana-Dakota Utilities Co., 194 F.2d 705-706 (C.A. 9, 1952), cert. den., 344 U.S. 827; Slater v. Peyser, 200 F.2d 360, 361 (C.A. D.C. 1952); Shotkin v. Popenhager, 255 F.2d 100 (C.A. 5, 1958), cert. den., 358 U.S. 855; Gunther v. E. I. DuPont De Nemours & Co., 255 F.2d 710, 715 (C.A. 4, 1958); Raughley v. Pennsylvania R. Co., 230 F.2d 387, 389-390 (C.A. 3, 1956); Howard v. Local 74, Etc., 208 F.2d 930, 932-934 (C.A. 7, 1953); Watson v. Providence Washington Ins. Co., 201 F.2d 736, 737 (C.A. 4, 1953); Marten v. Hess, 176 F.2d 834, 835 (C.A. 6, 1949).

to run from the denial of the motions on March 15, 1965 (R. 248). Sixty days thereafter, on the last possible day for filing (Friday, May 14, 1965), appellants "dated" a notice of appeal which was marked "received" and "filed" by the district court clerk on Monday, May 17, 1965 (R. 249). There is now no showing in the record of any other action by appellants which would change the date for filing a timely notice of appeal. Nor is there record indication of the place from which mailed (if it was in fact mailed) to the clerk in Sacramento, California; the date it could reasonably have been expected to be received, filed, etc.; or any circumstance which would legally excuse the late filing of appellants' notice of appeal. <sup>4/</sup> under the above statute, rules, and cases.

Based on this state of the record, this Court lacks jurisdiction of the appeal because appellants' notice of appeal

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4/ Three recent Supreme Court opinions are distinguishable: Wolfson v. Hankin, 376 U.S. 203 (1964); Thompson v. I.N.S., 375 U.S. 384 (1964); Harris Lines v. Cherry Meat Packers, 371 U.S. 215 (1962). In each, there was some substantial equity in favor of the appellant, such as misplaced reliance on action by the trial court or adversary at a time when a timely notice of appeal could have been filed - as discussed in Lord v. Helmandollar, 348 F.2d 780, 782, note 3 (C.A. D.C. 1965), cert. den., 383 U.S. 928.

was not timely "filed" on or before Friday, May 14, 1965. The appeal should therefore be dismissed. We turn now to the merits of the case and show that, even if jurisdiction were not lacking, the judgment below should be affirmed.

## II

### ON THE MERITS, NO ERROR OF LAW WAS COMMITTED

A. Certain of Appellants' Sales Were Properly Excluded in the Exercise of the District Court's Discretion.-- Recent sales of comparable lands in the vicinity of the property taken are the best evidence of value. Whether such transactions are "comparable" can raise preliminary questions of the sales' nearness in time to the date of taking, geographical proximity, and similarity in location and in adaptability. United States v. Whitehurst, 337 F.2d 765, 775 (C.A. 4, 1964), and cases cited there; United States v. Featherston, 325 F.2d 539, 542 (C.A. 10, 1963); Bailey v. United States, 325 F.2d 571, 572 (C.A. 1, 1963). Such questions are of course addressed to the discretion of the trial judge. "Whether or not a sale constitutes a 'comparable sale' so as to constitute evidence of value is within the sound discretion of the trial court. Fairfield Gardens, Inc., supra [306 F.2d 167 (C.A. 9, 1962)];



Bailey v. United States, 1 Cir., 325 F.2d 571 [1963]." United States v. Eden Memorial Park Association, 350 F.2d 933, 935 <sup>5/</sup> (C.A. 9, 1965).

Here, prior to trial appellants urged a pretrial procedure for simultaneous "disclosure of sales to be relied upon," objections, and hearing on objections "immediately upon the commencement of trial" (R. 178-179). Over government objection, District Judge Thomas J. MacBride's pretrial order directed such a procedure and recited that sales occurring after the date of taking would be presumptively inadmissible, but rebuttably so (R. 182-184). The parties exchanged such lists of sales on September 30, 1964, and filed objections (R. 185-192).

The Government's objections to three of appellants' proposed sales (involving 36, 40 and 80 acres, respectively, used for farming and not for livestock operations) were founded primarily on their not being physically comparable

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5/ See also United States v. Block, 160 F.2d 604, 607 (C.A. 9, 1947); Jayson v. United States, 294 F.2d 808, 810 (C.A. 5, 1961); United States v. 63.04 Acres at Lido Beach, 245 F.2d 140, 144 (C.A. 2, 1957); Ramming Real Estate Co. v. United States, 122 F.2d 892, 894 (C.A. 8, 1941).

Tract 104 which consisted of 1,139 acres (R. 192; Tr. 58-59). Senior District Judge Chase A. Clark, presiding at the valuation trial by designation, excluded those three sales; <sup>6/</sup> permitted use of one of appellants' sales of only 360 acres which occurred after the taking; permitted use of appellants' sale 35 to 45 surface miles away from Tract 104; <sup>7/</sup> and ruled that sales five or more years prior to the

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<sup>6/</sup> Appellants suggest that these sales should have been admitted because "these were sales of irrigated land" and some 167 acres of Tract 104 were irrigated (Br. 15). Admission was not mandatory for that reason. Tract 104 was taken as an entirety. Property taken is to be valued as a whole and its constituent parts considered only in the light of how they enhance the value of the whole. In other words, different elements of a tract are not to be separately valued and added together. United States v. Certain Parcels of Land in Rapides Parish, La., 149 F.2d 81, 82 (C.A. 5, 1945); Morton Butler Timber Co. v. United States, 91 F.2d 884, 888 (C.A. 6, 1937); United States v. Meyer, 113 F.2d 387, 397 (C.A. 7, 1940), cert. den., 311 U.S. 706; United States v. Jaramillo, 190 F.2d 300, 302 (C.A. 10, 1951). "If we attempt to cut a condemnation proceeding into slices, it bleeds." Phillips v. United States, 243 F.2d 1, 2 (C.A. 9, 1957).

<sup>7/</sup> Appellants are thus in no position to censure admission of two government sales some 20 miles distant from Tract 104 as not being "nearby sales" in the "immediate vicinity" (Br. 13, 15, 26).

date of taking would not be admissible (Tr. 56, 58-62, 64). This ruling resulted in exclusion of one sale listed by each of the parties and accorded with appellants' own objection to a government-proposed sale occurring seven years prior to the taking, appellants stating: "It's somewhat remote in time. I think the sale was back in '53, which is some eleven years ago," i.e., eleven years from trial time (Tr. 46-47, 50).

After the district court announced his ruling on appellants' objection to the Government's proposed sale based on remoteness of time, appellants offered to withdraw their objection if it meant excluding their proposed 1954 sale (Tr. 50, 52), admitting "that it is primarily a matter of discretion for the court depending on the circumstances" (Tr. 51). The district court said it would permit authority to be submitted relative to the five-year sale ruling and would

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8/ Appellants criticize this ruling as to the time element for admissibility of one of their eight proposed sales as an "arbitrary" exercise of discretion (Br. 13, 15). While they assert that they were unfairly restrained in presenting their case (Br. 11-18), appellants do not so characterize exercise of the same discretion on the same element which benefited them and resulted in the admission of their sale subsequent to the taking. The assertion is without record foundation.



permit raising the question again (Tr. 55, 63). Appellants' objections to other of the Government's proposed sales were "overruled without prejudice, and I'll reconsider it at the time it goes on" (Tr. 57, 62). After recess and before the presentation of testimony to the jury, appellants' counsel not having submitted authorities because "It was not my understanding that we were required to submit them within that time" (Tr. 197), the district court ruled "that comparable sales must be within five years of the date of taking \* \* \*" (Tr. 64, 196-200).

Under these rulings, witnesses for each party were permitted to testify to sales within five years of the taking which they regarded as comparable. Although there were such sales, Mallon relied upon only two (Tr. 100, 102, 109) and Smith cited none.

It is manifest that the trial court was exercising its discretion as to the sales tendered by both parties on the question of comparability, based on factors of remoteness in time and of physical dissimilarity. Both parties' objections and arguments raised such questions which were resolved by the court, the resolution applying equally to each. On this record, no abuse of discretion resulting in prejudice is shown.

B. The Government's Wilder-Boswell and Wolfe-Petty Sales Were Proper Bases for the Value Opinions of Campbell and Rhodes.--The Government's witnesses Campbell and Rhodes regarded the Wilder-Boswell and Wolfe-Petty sales as being most comparable to Tract 104, but each testified to other sales and relied upon them (Tr. 436-469, 691-724). These two sales were some 20 miles from Tract 104 and adjacent to each other. Campbell described the 1959 Wilder-Boswell sale as involving \$135,000 and 1,142 acres of ranch property bisected by a creek which did not flow year-round and of which 80 acres were irrigated (Tr. 455-457); he regarded this sale as "the most comparable as to size and use" (Tr. 458). Campbell then testified to the 1960 Wolfe-Petty sale as involving ranch property, \$96,000, 960 acres of which 135 were irrigated, and a

creek (Tr. 458-462). These two sales were similarly relied  
upon by Rhodes (Tr. 701-712).  
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9/ Reliance on these sales by Campbell and Rhodes is to be contrasted to the bases of appellants' valuation witnesses. Michael complained (Tr. 156): "\* \* \* I haven't found one piece of property that completely compared with the subject property." Nevertheless, he testified to the following sales (Tr. 181-195, 200-205, 291):

Prine-Arnett (1959; 4,189 acres; \$300,000; seasonal livestock operation; not in the butte area);  
Ball-Briggs (1958; 5,100 acres; \$285,000; seasonal livestock operation; not in the butte area);  
Michael-Newby (1960; 320 acres; \$64,000; only sale with irrigated land); and  
Gaskin-Fox (1956; 506 acres; \$65,000; 30 air miles or 35 to 45 surface miles away).

Smith answered, "No, sir" when asked if he had any "sales that you can present to the jury in this Court upon which you can rely;" and answered, "You're correct," when asked whether "you refer to no particular sales, you refer to no breakdown of the property, you refer to no carrying capacity, you refer to no historical operation, and you refer to no specifics other than your opinion of market value \* \* \*" (Tr. 365, 373). Mallon referred to the Prine-Arnett and Ball-Briggs sales (Tr. 100, 102, 109), but said that "there were no close sales in the area around where we were within a few miles" (Tr. 99) and that "there were no other properties that I would consider even comparable \* \* \*" (Tr. 108).

Comparable sales as indicated above are the best indicia of market value.



These two sales were objected to by appellants prior to trial, on the grounds that they were physically dissimilar, too remote in distance, and in a different watershed subject to different economic and climatic conditions (R. 190). At the hearing prior to trial, appellants added that both had been purchased for subdivision purposes (Tr. 48, 61-62). Appellants' objection to these sales was "overruled without prejudice, and I'll reconsider it at the time it goes on" (Tr. 57). The district court further specified that its "rulings will be made without prejudice to raising the question again" (Tr. 62).

Appellants did not renew their objections to these sales during the trial, nor move to strike Campbell's and Rhodes' value opinions because they rested on these sales. Rather, appellants' tack was to attempt to show by cross-examination and by rebuttal testimony that the sales were not "comparable." To this end, lengthy and complete cross-examination and rebuttal were permitted (Tr. 494-497, 529-551, 567-571, 746-778, 786-800, 811-812, 820-823, 860-863, 868-871, 868 second series of pages - 882). For example, appellants on rebuttal called purchasers involved in the Wilder-Boswell

and Wolfe-Petty sales. They testified that they had purchased the properties for subdivision purposes (Tr. 820-822, 860-863). On cross-examination the purchaser in the first sale admitted that after the sale the property continued to be used for a livestock operation and that subdivision plans had not yet materialized (Tr. 824). The purchaser in the second sale answered "No" when asked "because you bought it for potential subdivision, sir, do you think you paid less than the market value for it" (Tr. 864).

The gravamen of appellants' argument on appeal is that property purchased for a use different from the admitted highest and best use of the property taken cannot as a matter of law qualify as a "comparable sale" (Br. 18-27). We know of no such rule and submit that in this case error cannot be validly predicated on the admission of these sales: In United States v. Whitehurst, 337 F.2d 765 (C.A. 4, 1964), five of the ten sales relied upon by the government appraiser did not contain mineral deposits. The property taken there did. The court said (at 775): "Possibly the Commission was laboring under the impression that these sales were not comparable because the lands were sold as farm land and not as borrow pits. If so, it was grossly mistaken." It then declared (at 775):

Real property may be unique and the comparable sales too few to establish a conclusive market price, "[b]ut that does not put out of hand the bearing which the scattered sales may have on what an ordinary purchaser would have paid for the claimant's property." United States v. Toronto, Hamilton & Buffalo Nav. Co., 338 U.S. 396, 402, 70 S.Ct. 217, 221 (1949). 10/

The record here demonstrates that the two sales were patently the most comparable in the testimony. Also their comparability

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10/ Union Electric Co. v. Jones, 356 S.W.2d 857 (Mo. S.Ct. 1962), selectively quoted by appellants (Br. 25-26), actually subverts appellants' suggestion. The court there stated the rule (at 862) that "The admissibility of such evidence depends upon the nearness of the sale in point of time and the proximity of the property, of the similarity in location, and in the use to which the property is adaptable" and approved rejection of the Sutterfield sale because "there was no showing that appellants' land was adaptable for mining yet the Sutterfield land was sold for mining purposes." Here, the two sales were shown to be "adaptable" for live-stock operations. There might be some substance to appellants' argument in a case where the properties involved in the sales were purchased for a lower economic purpose than the property taken or where the other properties' use at the time of purchase was different from that of the property taken. But that is not appellants' case and record.



was a matter for the discretion of the district court. See authorities, supra, pp. 15-16, and note 5. <sup>11/</sup>

Further, appellants failed to renew their objections to the sales and reliance thereon by the government appraisers. Appellants, evidently having decided to take the matter to the jury, were accorded full right of cross-examination and rebuttal to discredit reliance on the two sales and can now show no prejudice with regard thereto. The jury was apparently impressed that appellants' own rebuttal witnesses admitted that the properties were ranch properties both at the time of and after the purchases, and that subdivision plans had not been realized. The jury may and should have been similarly impressed with one purchaser's feeling that, though the property was purchased for a different use, market value had been paid. Finally, there is no record showing that sales prices of properties purchased for potential subdivision were less than those paid for ranching. While this record does not so show, just the opposite is generally true, and, arguably, appellants were benefited by such sales.

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<sup>11/</sup> United States v. Michoud Industrial Facilities, 322 F.2d 698 (C.A. 5, 1963), relied upon by appellants (Br. 23-25, 27), is not to the contrary. The sales there were suspect because the record showed reliance on sales "which neither by location nor quantity of land involved or other characteristics bear any resemblance to each other in the market." 322 F.2d at 706. That describes most of appellants' market data, not the two sales under discussion.

Just as such sales were admissible in United States v. Whitehurst, 337 F.2d 765, 775 (C.A. 4, 1964), because "All the indicia of an arm's length transaction were present," each seller "evidently received his asking price and there is no evidence that there was a market which would have paid him more," so, here, the two sales were admissible as one of the bases for Campbell's and Rhodes' value opinions.

C. The District Court's Miscellaneous Rulings on the Extent of Cross-Examination, Rebuttal Testimony and Instructions Were Correct.--1. Cross-Examination into Membership and Practice of the American Institute of Real Estate Appraisers was Validly Confined. As a general rule, the trial court possesses vast discretionary control over the extent of cross-examination, the degree of control dependent on particular subjects and circumstances. Even where the subject is evidence directly related to value, such as the condition of the property, the trial court has wide discretion in limiting the scope of cross-examination. United States v. Block, 160 F.2d 604, 607 (C.A. 9, 1947); Stephens v. United States, 235 F.2d 467, 471 (C.A. 5, 1956); Foster v. United States, 145 F.2d 873 875 (C.A. 8, 1944); Ramming Real Estate Co. v. United States,

122 F.2d 892, 894-895 (C.A. 8, 1941). And while generally cross-examination for impeachment purposes is not limited to the scope of the direct examination, the trial court's discretion also extends to restriction of cross-examination for such purposes, as declared in Carlstrom v. United States, 275 F.2d 802, 808 (C.A. 9, 1960):

Appellants next sought to impeach the credibility of the witness Hallock's testimony by showing that some of the repairs he had suggested as "necessary" as of May 1, 1953, had not in fact been made down to the time of trial. Appellants proved this fact, and developed many others on cross-examination. Finally the court called a halt, pointing out that whether or not repairs were made, the property could still be used, and that "this question of usefulness is a matter of degree." We think such supervision of cross-examination, and its curtailment when over-extensive, lies precisely within the discretion granted the trial court in such matters.

Appellants cite no cases wherein such action by the court has been deemed error, and we think for good reason. United States v. Block, 9 Cir., 1947, 160 F.2d 604, 607. 12/

Here, on direct examination, government appraisal witness Campbell's qualifications were established (Tr. 374-385).

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12/ Similarly, appellants produce no such authorities (Br. 37-38).



It was developed that he is a member of the American Institute of Real Estate Appraisers (Tr. 379). He related the Institute's qualifications for membership, functions, publication, and educational endeavors, and stated without objection that when Institute members testify in court and there is a substantial difference in their valuation testimony, each must submit his appraisal to the Institute for review and disposition (Tr. 380-384). When asked by government counsel, "Unless you are a member of the Institute, then there is really no governing control over a man who merely calls himself an appraiser, is that correct?" (Tr. 385), Campbell did not agree, contrary to appellants' version of the transcript (Br 33-34, 36), but said, "Well, there are other organizations that might belong to that would have ethics that would tend to govern him. As I say, the American Institute is most strict in governing their members" (Tr. 385). This was the extent of reference to the matter on direct examination.

On cross-examination, inquiry was made into Campbell's appraisal qualifications and experience, employment and compensation for appraisals for the Black Butte Project, employment in other cases by both condemnors and condemnees, testimony in court against the United States in only one case, and appraisal teaching experience (Tr. 470-479). Appellants then began questioning on the Institute's requirement that members submit their appraisals for review where there is a substantial difference in their valuation testimony (Tr. 480-481). Appellants developed that appraisals often vary, regardless of the appraisers' membership in organizations; and that Campbell has submitted appraisals to the Institute three or four times, once involving a tract in this project (Tr. 482-483). Mentioning a specific tract and difference in amount of money, appellants wanted to know whether "you and an appraiser on the Lampley property differe [sic] by over \$100,000" (Tr. 483). The Government objected to broaching this subject in the presence of the jury, explaining that reports had been made, that that case "is now presently on appeal," and that the appraisers' valuation difference in the Lampley case is completely improper and

immaterial in this case where the property and appraisers are different (Tr. 484). The court agreed (Tr. 484): "We're not going to try any other condemnation suits. We've got our hands full with this. The objection will be sustained." Appellants said, "I did wish to ask the witness about the amount of disparity. I don't care about any other detail on it" (Tr. 484). The Government asked for, and received, permission to determine whether that matter had been reported to the Institute and whether the Institute was reserving action until it is resolved by the courts, the court having cautioned: "Well, if you ask him, chances are you'll be opening the gate here. But you go ahead if you want to" (Tr. 485).

Upon resumption of cross-examination, appellants asked Campbell "whether your figure was \$108,000 and the other gentleman's figure was \$220,000," to which the Government again objected (Tr. 486). Appellants believed the Government "has opened the door as your Honor suggested might be the situation" (Tr. 486). The court stated (Tr. 486, 487): "Well, I think I'll close the door on this question. I don't think it's proper" and "I won't open the trial of some other case."



I think the Court and Jury and lawyers have their hands full with this one."

Subsequently, out of the presence of the jury (Tr. 558), appellants made an offer of proof concerning "an incident where he [Campbell] was an appraiser for the Division of Highways of the State of California, and while in the course of testimony made an offer to purchase property which was a remainder on the partial taking, a matter which had come up in a previous or several previous trials" (Tr. 559). Appellants here said that Campbell had made an offer in open court in that State case to purchase the remainder, to "create some evidence in the case," and that the Institute, to which the incident had been reported, "had absolved the witness of any criticism" (Tr. 560; Br. 37). The court declined to have cross-examination on this subject, on grounds that it would "start another trial \* \* \*" and "We'd have to bring all that evidence in \* \* \*" (Tr. 560-561). A colloquy between government counsel and the court followed (Tr. 561):

MR. RENDA: If your Honor please, so that the record is clear, as Mr. Blade has begun the trouble of making an offer of

proof, I think the record should reflect that this matter was initially brought up in another matter tried by another attorney before Judge Carter, in which I was the attorney for the government, and that Mr. Blade has the transcript of that proceeding. And Judge Carter at the time allowed it because neither myself nor Mr. Campbell knew what the testimony was going to be or the questions being asked.

However, after it was asked, Judge Carter did state that he felt this was opening up an entire matter, and if he had known the direction, he would not have allowed it. Now, subsequently in the case that your Honor tried, Cass Hamilton in this district --

THE COURT: I remember that.

MR. RENDA: this matter was brought up and was completely gone into in the court's presence, so your Honor was well aware of the circumstances, when you made the ruling prior to this offer of proof.

The subject of Institute membership and the procedure for reporting differences in members' valuation testimony was not raised by the Government in the direct examination of its other appraisal witness, Rhodes. In the course of relating his qualifications and experience as an appraiser, Rhodes merely stated that he was a member of the Institute (Tr. 671-672). On cross-examination of Rhodes, however,

it was appellants who broached the subject, again over Government objection, and the court adhered to its prior ruling (Tr. 732-735). <sup>13/</sup>

The trial court was clearly correct in limiting cross-examination on this collateral subject, observing that further inquiry would prolong this trial (especially where the trial court was familiar with the subject from a previous trial and where apprised that the matter involved in part other judicial proceedings, not all then resolved), and that inquiry would "start another trial \* \* \*" (Tr. 560-561). If Institute membership and practice were an issue in the case, it plainly was remote and was created in large measure by appellants. As in Carlstrom (275 F.2d at 808), "such supervision of cross-examination, and its curtailment when over-extensive, lies precisely within the discretion granted the trial court in such matters." No abuse of discretion and no prejudice are shown, we submit, as to a necessity vital to the jury in weighing the opinions of the witnesses.

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<sup>13/</sup> There is thus no substance to appellants' charge that "the Government deliberately created an issue concerning the responsibility of expert witnesses \* \* \*" and, as previously noted, p. 28, appellants misquote the record in attributing a "statement" to government counsel concerning Institute supervision of its members (Br. 33-34, 36; Tr. 385).



2. Inquiry into the Compensation of Government Witness Rhodes for His Appraisal Services Was Properly Restricted. The district court's ruling as to appellants' attempted inquiry into the compensation actually paid government witness Rhodes for his appraisal services, was not erroneous for three independent reasons. First, appellants were not unduly restricted concerning this matter. Specifically, appellants were permitted to establish on cross-examination of the witness the fact that the witness was being paid (Tr. 732, 785). In fact, the government stated in the presence of the jury that it would stipulate that its witnesses were being paid (Tr. 732, 782-783). The Government, did, however, object to further inquiry concerning the precise amount of compensation as not being material or relevant (Tr. 732, 782-783). The district court agreed, saying, "I think he can testify he's being paid for his services, and that's as far as you should go" and "Well he's testified that he's paid, and I think that is all that is necessary" (Tr. 732, 785). If the compensation of the witness were necessary to indicate "motive, bias or interest" under the rule contended for by appellants (Br. 38), the answer

is that the fact of compensation was permitted to be shown, and it was unnecessary to go beyond that fact into a purely collateral matter and inquire into the amount of compensation, to accomplish appellants' stated purpose.

Second, the ambit of examination into collateral issues is addressed to the sound discretion of the trial judge, as appellants' own authority acknowledges (Br. 41). United States v. 25.406 Acres in Arlington County, Va., 172 F.2d 990, 995 (C.A. 4, 1949), cert. den., 337 U.S. 931. <sup>14/</sup> The issue in this case was the amount of just compensation owing the landowners for the taking of Tract 104 -- not the amount paid the appraisal witness for his services. McCandless v. United States, 298 U.S. 342, 348 (1936). It was sound discretion here, we believe, to "eliminate proof of collateral issues which would tend to obscure the real issue, namely, the value of the property." Hickey v. United States, 208 F.2d 269, 277 (C.A. 3, 1953), cert. den.,

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<sup>14/</sup> See Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656, 670 (C.A. 9, 1963), cert. den., 375 U.S. 922; Basic Books, Inc. v. F.T.C., 276 F.2d 718, 721 (C.A. 7, 1960); Southern Farm Bureau Cas. Ins. Co. v. Mitchell, 312 F.2d 485, 499-500 (C.A. 8, 1963); McNenar v. N.Y., Chicago and St. Louis R. Co., 20 F.R.D. 598, 600-602 (W.D. Pa. 1957).

347 U.S. 919. <sup>15/</sup> As stated in McCormick, Evidence (1954)  
sec. 40, pp. 85-86:

15/ Appellants argue that the additional inquiry should have been allowed because Rule 43(a), F.R.Civ.P., makes the federal or state rule favoring the reception of evidence absolutely controlling and the California rule allows questioning of "any witness as to all expenses and fees paid or to be paid to such witness by the other party." Cal. Code of Civ. P., sec. 1256.2, repealed by Cal. Stats. 1965, c. 299, p. , sec. 21; see Cal. Evidence Code sec. 722(b).

Appellants' argument completely ignores the trial court's discretion on such a matter, and would deprive the court of any leeway by compelling selection of the local rule in all situations (Br. 39-41). We know of no such intent by the rulemakers in adopting Rule 43(a). Indeed, with express reference to Rule 43(a), the Third Circuit stated, in a recent federal condemnation case, United States v. 60.14 Acres in Warren and McKean Counties, Pa. (Seibel) (C.A. 3, No. 15313, June 24, 1966) not yet reported:

The increasing recognition of the principle which confers on the trial judge a wide discretion in dealing with evidence is based in large part on the federal rule that admissibility and competency are to be determined on practical considerations. This discretion is a recognition of the variations in individual circumstances. \* \* \*

See also United States v. Certain Interests in Property in Borough of Brooklyn (Fort Hamilton), 326 F.2d 109, 114 (C.A. 2, 1964), cert. den., 377 U.S. 978; Westchester County Park Commission v. United States, 143 F.2d 688, 693-695 (C.A. 2, 1944), cert. den., 323 U.S. 726.



It seems that if the witness fully admits the facts claimed to show bias, the impeacher should not be allowed to repeat the same attack by calling other witnesses to the admitted facts. And it is held that when the main circumstances from which the bias proceeds have been proven, the trial judge has a discretion to determine how far the details, whether on cross-examination or by other witness, may be allowed to be brought out. After all, impeachment is not a central matter, and the trial judge, though he may not deny a reasonable opportunity at either stage to prove the bias of the witness, has a discretion to control the extent to which the proof may go. He has the responsibility for seeing that the side-show does not take over the circus. \* \* \*

Finally, admissibility of evidence must be determined under federal law and not state law in a condemnation proceeding brought by the United States. In United States v. 93.970 Acres, 360 U.S. 328, 333, note 7 (1959), the Supreme Court, referring to the "conformity" statute, said: "And insofar as it required such procedural conformity it was clearly repealed by Rule 71A, Federal Rules of Civil Procedure, at the time this suit was brought. It follows that federal law was wholly applicable to this case." Since federal law controls both substance and procedure in federal

condemnation proceedings, <sup>16/</sup> the California statutory law of evidence is not operative. This is necessary, because the issue is just compensation under the Fifth Amendment. The federal standard very often differs from state standards of compensation and those standards are most frequently enforced by rules as to admission or exclusion of evidence. 60.14 Acres in Warren and McKean Counties, Pa. (Seibel), supra.

For each of these reasons, inquiry into the compensation paid the witness Rhodes for his appraisal services was properly restricted.

3. Inspection of Appraisal Notes Not Consulted by Rhodes in His Testimony Was Properly Withheld. Also for the reasons just discussed, appellants were not entitled as of right to examine appraisal notes not consulted by Rhodes in his testimony. Squarely in point is Phillips v. United States, 148 F.2d 714, 717 (C.A. 2, 1945):

Appellants complain that they were denied the right to inspect the appraisal report which Bowen used to refresh his recollection.

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<sup>16/</sup> 360 U.S. at 332-333 and notes 6 and 7. Cf. United States v. Featherston, 325 F.2d 539, 542 (C.A. 10, 1963); United States v. Smith, 355 F.2d 807, 812 (C.A. 5, 1966).

It is said that this would have shown that Bowen failed to consider the 1942 purchases for Curtiss. The right to inspect such data is not absolute, but lies within the discretion of the trial court. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 233, 60 S.Ct. 811, 84 L.Ed. 1129. Moreover, the data shown in this appraisal appear elsewhere in the record. \* \* \*

Cf. Goldman v. United States, 316 U.S. 129, 132 (1942); see McCormick, Evidence (1954) sec. 9, pp. 14-18. The district court in its discretion therefore was not obliged to permit unlimited examination, and the California statutory rule of evidence was not controlling. Cal. Code of Civ. P. sec. 2047, repealed by Cal. Stats. 1965, c. 299, p. 17/, sec. 126; see Cal. Evidence Code secs. 771 and 1237.

In addition to those reasons, appellants' arguments and authorities (Br. 27-32) are addressed to situations where materials are either handed to the witness or which he actually consults in the course of his testimony, for purposes

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17/ It is not even clear that the California courts would construe the local statutory rule to reach the result contended for by appellants in this case. Smith v. Smith, 135 Cal.App.2d 100, 105-106, 286 P.2d 1009, 1012 (1955); People v. Gallardo, 41 Cal. 2d 57, 66-68, 257 P.2d 29, 35-36 (1953); People v. Jones, 2 Cal. Rptr. 305, 308, 177 Cal. App.2d 420, 423-424 (1960).



of "refreshing present memory" or "refreshing past recollection (with all the subtle distinctions attendant thereto) as to "facts." The rule urged by appellants is inapposite to notes of mental calculations and processes, such as an appraisal report. Cf. C. W. Hull Co. v. Marquette Cement Mfg. Co., 208 Fed. 260, 265 (C.A. 8, 1913).

This Court has held that it is permissible to limit inspection of a memorandum book to the parts consulted. Brownlow v. United States, 8 F.2d 711 (C.A. 9, 1925). "[T]he defendants were entitled to see only those parts of the paper used by the witness." United States v. Easterday, 57 F.2d 165, 167 (C.A. 2, 1932), cert. den., 286 U.S. 564. Here, appellants were accorded examination of everything referred to by Rhodes in the course of his testimony (Tr. 724-730, 751-752, 777-780, 783-785, 791; see Tr. 490-493, 665). No error and prejudice, we submit, are shown by refusal of unlimited inspection in this case.

4. Snelson's Opinion Testimony Was Not Stricken. While appellants charge error "in striking the opinion testimony of the witness Snelson" (Br. 41), their entire discussion, spread over six printed pages, is a quarrel relating

the striking of a single sentence of the witness on rebuttal (Br. 41-46). The single sentence on rebuttal was expression of an opinion answer, unresponsive to the question asked, that the Tract 104 area was "far superior to anything in the Red Bluff area as far as producing feed for livestock goes," the latter area being the location of two of the sales (Wilder-Boswell, Wolfe-Petty) relied upon by government witnesses (Tr. 874-875).

No error was committed: (1) The comparability of the two areas as such and "anything in the Red Bluff area" was not inquired into by the Government in presenting its case. Nor was that subject broached by appellants in cross-examining government witnesses. Hence, such inquiry by appellants on rebuttal was improper and, if permitted, would have introduced a purely collateral and irrelevant matter into this trial. (2) The striking of the unresponsive answer was not objected to by appellants, who, with opportunity for redirect examination, excused Snelson and did not solicit a responsive answer comparing the properties (Tr. 874-875, 868 second series of pages). Further, this entire matter was ignored by appellants in their motion for

new trial and related papers (R. 204-213). The specification of error is thus not properly before this Court. <sup>18/</sup> (3)

Most persuasive is the fact that the striking of this single sentence has no relation to, and does not support, appellants' argument on appeal that they were somehow prevented from rebutting the comparability of the two sales (Br. 41-46). On the contrary, appellants had full opportunity without objection to explore with Snelson on rebuttal his opinion that the Wilder-Boswell and Wolfe-Petty sales -- not areas -- were not comparable to Tract 104. As to the first sale, Snelson stated (Tr. 868, 869, 870): "But the range land in general is of very mediocre caliber: short growing season in the Spring \* \* \*"; "Well, it would be pretty hard for a man and a family to make a living on it without outside rentals or other property;" and "Well, after I moved onto the ranch, why the irrigation well provided insufficient water to irrigate the irrigated pasture that they had on the property at that time." As to the second, he said (Tr. 873): "Well, it is ju

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<sup>18/</sup> United States v. Benning, 330 F.2d 527, 535 (C.A. 9, 1964); Pehrson v. C. B. Lauch Construction Co., 237 F.2d 269, 270-271 (C.A. 9, 1956).



a winter range of very low caliber. It's not very good feed range;" and "Oh, no, no, it [the sale property] would not be" an economic unit.

Appellants' statement <sup>19/</sup> and argument <sup>20/</sup> are thus

simply based on misreading of the record and an attempted use of a rule of law absent facts warranting application of the rule (Tr. 865-875, 867-868, second series of pages).

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<sup>19/</sup> Br. 44: "Yet, the trial court at the suggestion of government counsel struck the opinion of the obviously well qualified witness Snelson simply because it constituted an opinion concerning the quality and comparability of the two primary government sales to the subject property."

<sup>20/</sup> Br. 44-46, citing Hickey v. United States, 208 F.2d 269, 276-277 (C.A. 3, 1953), cert. den., 347 U.S. 919, for the rule that prohibition of rebuttal of important elements of an adversary's case can be error.

5. The Rulings on the Instructions Were Well Founded. Appellants' final complaint on appeal (Br. 46-49) pertains to instructions given by the district court and to refusal to give one of appellants' proposed instructions. The part of two instructions complained of are as follows (Br. 10, 48; Tr. 945, 949):

[B]ona fide sales of comparable properties may [made?], within a reasonable time, before the date of the valuation of the property involved in this action are the best evidence of its fair market value. To the extent that other properties were actually comparable to the property involved in this action, their sales are the best evidence indicative of its fair market value. You are instructed, however, that the extent of comparability or non-comparability of the sales testified to here is for you to determine and weigh. \* \* \*

\* \* \* \* \*

You must before considering the weight of the opinion of such witness first find from the evidence that the facts upon which his opinion is based are true. \* \* \*

The proposed instruction refused was appellants' proposed instruction 16 (Br. 10):

In this case evaluation experts have been called by both sides, and have testified as to the factors considered by them

in arriving at their opinion as to the market value of the land condemned. The factors considered by the expert are not in themselves direct evidence of the fair market value of the land condemned, but may be considered by you only for the purpose of determining the weight, if any, to accord to the testimony of the expert in his ultimate opinion as to the fair market value of the land in question as to the date of taking.

Appellants objected to the first (Tr. 932-933, 956)

but not to the second, saying to the court (Tr. 937): "I guess you're right. I see what you mean: Insofar as it's based upon facts of evidence that he's given. I withdraw the objection." The second is not therefore basis for complaint on appeal, although correct in the context made, as shown below, infra, pp. 46-47. <sup>21/</sup>

The first quoted instruction regarding evidence of sales was of course plainly correct. As previously discussed, in the absence of recent voluntary sales of the condemned property itself, the "best evidence" of value available is

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<sup>21/</sup> United States v. Benning, 330 F.2d 527, 535 (C.A. 9, 1964); Parks v. United States, 293 F.2d 482, 486-487 (C.A. 5, 1961); Western Fire Ins. Co. of Fort Scott, Kan. v. Word, 131 F.2d 541, 543-544 (C.A. 5, 1943).

the prices at which comparable lands in the vicinity changed hands at about the time of the taking. "It is settled law that comparable sales are the best evidence of value."

United States v. Whitehurst, 337 F.2d 765, 775 (C.A. 4, 1964), and cases cited there; Bailey v. United States, 325 F.2d 571, 572 (C.A. 1, 1963); United States v. Featherston, 325 F.2d 539, 542 (C.A. 10, 1963. Featherston and the recent case of United States v. 60.14 Acres in Warren and McKean Counties, Pa. (Seibel) (C.A. 3, No. 15313, June 24, 1966), not yet reported, also show the federal rule to be that appraisal experts may testify to such sales as an exception to the hearsay rule.

Relative to appellants' refused instruction, we believe the instructions given, considered together, informed the jury of that part of its substance which was applicable to this case. The court here instructed (Tr. 948): "You may also take into consideration other bona fide sales of property in the immediate vicinity and similarly located within a reasonable time near the date of taking \* \* \*." It was in the context of explaining expert testimony and the evaluation of it by the jury that the court stated (Tr. 949): "You must



before considering the weight of the opinion of such witness first find from the evidence that the facts upon which his opinion is based are true. You are not bound by any opinion testimony, and it should be considered by you in connection with all other evidence, it should be given such weight as you believe it is entitled to receive." There was this further instruction (Tr. 952):

In determining the weight to be given to the testimony of each valuating witness, you may and should consider his education, experience, knowledge and investigation of all facts and circumstances pertaining not only to the property in question but also his knowledge and investigation of sales of other properties in the area. You should also consider the manner in which the witness has applied his knowledge of the facts and circumstances concerned in arriving at his market value. If you believe that an opinion of any witness was expressed without sufficient investigation in order to inform him about all of the material facts or without sufficient knowledge of the material facts before him to form a just opinion, or if you find that he has given erroneous facts, or if you believe the reasons advanced by him for his opinion are unsound, you may entirely disregard his opinion or you may give it such weight as in your judgment you think it merits, after considering all the evidence before you.

Considered as a whole, these instructions embraced the material substance of appellants' proposed instruction. There is no record indication that the court, counsel for the parties, or witnesses claimed in the course of this proceeding that sales referred to as "factors" to support their value opinions were used as "direct" evidence of value (Br. 48). Certainly, no error and no prejudice can be assigned for refusing to give appellants' proposed instruction literally. Brown v. Chapman, 304 F.2d 149, 154 (C.A. 9, 1962); United States v. Baker, 279 F.2d 603, 604-606 (C.A. 9, 1960); Harwell v. United States, 316 F.2d 791, 794 (C.A. 10, 1963).

#### CONCLUSION

The appeal should be dismissed because the notice of appeal was not timely filed. If the merits are considered, the judgment should be affirmed for the foregoing reasons.

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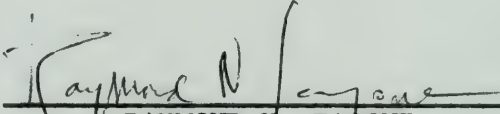
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CERTIFICATE OF EXAMINATION OF RULES

I certify that I have examined the provisions of Rules 18 and 19, of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the tendered brief conforms to all requirements.

  
\_\_\_\_\_  
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FEB 14 1967

No. 20,444

IN THE

United States Court of Appeals  
For the Ninth Circuit

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J. D. MALLON and CHELLIE MALLON,	}
vs.	
UNITED STATES OF AMERICA,	
	<i>Appellants,</i>
	<i>Appellee.</i>

APPELLANTS' CLOSING BRIEF

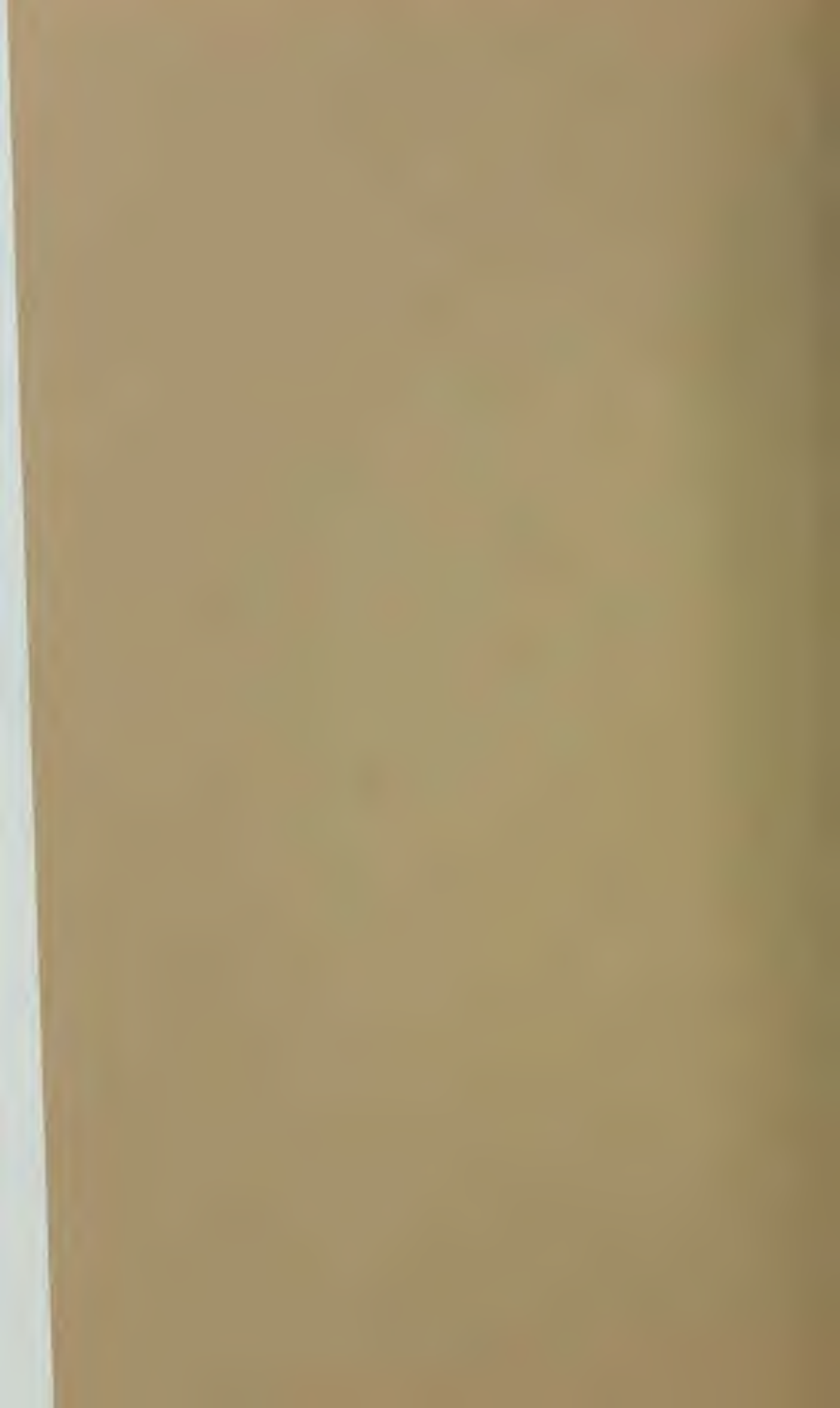
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No. 20,444

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

J. D. MALLON and CHELLIE MALLON,  
*Appellants,*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

**APPELLANTS' CLOSING BRIEF**

---

**SUMMARY OF ARGUMENT**

This Court should hear and decide the appeal on the merits because literal compliance with Rule 73(a) is no longer vital to jurisdiction. The clerk delayed 14 days in giving notice of the entry of the order denying appellants' motion for new trial. Despite language to the contrary in Rule 73(a) time for appeal commences upon receipt of such notice in which case the Notice herein, filed but one day late pursuant to Rule 73(a), was nevertheless timely.

The trial court did not exercise discretion in excluding appellants' sales. Actually it declined to do so although so urged by appellants.

*State v. Whitehurst*, 337 F. 2d 765 cited by appellee in support of the admission and reliance by its

appraisers on two appellee sales is not in point because there a seller was deceived about an immaterial factor whereas the state of mind of the buyers in sales is material in this case. It is immaterial whether subdivision land has greater value than agricultural land since sales of subdivision land can not properly be used to value the subject property which was unanimously classified as agricultural land.

Appellants' contention that it was prejudicial error to deny their counsel's request to examine notes taken to the stand and referred to by the witness is not weakened by authorities cited by appellee for they generally apply to situations where the witness did not take his notes to the stand and refer to them during testimony as in this case.

Evidence bearing upon the relative reliability of expert witnesses is not collateral but is of direct importance where the ultimate issue turns on the opinion testimony of such witnesses. *United States v. 60.14 Acres in Warren and McKean Counties, Pa.* (not yet reported), cited by appellee, does not support its contention that judicial discretion authorized the exclusion of evidence concerning compensation of witnesses although admissible by state statute. On the contrary such case applied Rule 43(a) as a rule of admission rather than exclusion, and is in accord with appellants' contentions. Other cases cited by appellee reflect the admission or exclusion of evidence or the following of basic procedures under the well established rule that matters of substance in federal eminent domain trials are governed exclusively by federal law.

The argument of appellee concerning the striking of the opinion testimony of rebuttal witness Snelson misses the question of law involved, i.e., whether opinion evidence is permitted in rebuttal, and is confusing in quoting and referring to the record. The argument by appellee that the answer was properly stricken because it was too broad or non-responsive is without merit because there was no objection on that or any other ground. The objection was to the question solely on the ground above stated that opinion testimony on rebuttal is improper and the court struck the answer saying that it was doing so "in view of the objection." It was not necessary for appellants to object to such ruling or to cite it as error in their motion for new trial in order to urge it before this Court.

Appellants' contentions of error in the instructions are relied upon, comment upon appellee's argument that no error with respect thereto occurred being deemed necessary.

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## I

### NOTICE OF APPEAL

#### **A. Compliance With Time Requirements of Rule 73(a) Concerning Filing of Notice of Appeal Is No Longer Strictly Jurisdictional.**

Appellee has quite properly raised the question of the timeliness of the filing of the notice of appeal and has correctly stated that the notice was not filed within 60 days after the entry of Judge Clark's Order

Denying Appellants' Motion for New Trial as provided by Rule 73(a). Appellee has further urged that such compliance is mandatory and jurisdictional. Appellants cannot agree.

28 U.S. Code Section 2107, which was the statute requiring the filing of the notice of appeal within the time therein set forth, was effectively repealed by the adoption of 28 U.S. Code Sections 2072 and 2073, which enabled the adoption of the Federal Rules as well as the Judicial Code of 1948 effective September 1, 1948, C. 646, 62 Stat. 869. By such action, Congress placed the regulation of appeals within the rule making power of the court.

On page 11 et seq. of its brief appellee urges that failure to file the Notice of Appeal on or before the sixtieth day after such Order was entered, i.e., the absence of strict compliance with Rule 73(a), mandatorily deprives this Court of jurisdiction and compels dismissal of the appeal. The authorities cited in support (pages 12 and 13) should be examined in the light of the following decisions of the Supreme Court:

*Harris Lines v. Cherry Meat Packers*<sup>1</sup> (1962)

371 U.S. 215, 9 L. ed. 2d 261, 83 S. Ct. 283;

*Thompson v. Immigration and Naturalization Service*<sup>1</sup> (1964) 375 U.S. 384, 11 L. ed. 2d 404, 84 S. Ct. 397;

*Wolfsohn v. Hankin*<sup>1</sup> (1964) 376 U.S. 203, 11 L. ed. 2d 636, 84 S. Ct. 699, reh. den. 376 U.S. 973, 12 L. ed. 2d 87, 84 S. Ct. 1133.

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<sup>1</sup>Cited in footnote Appellee's Brief p. 4.



Although appellee argues (p. 14) that such decisions are distinguishable, i.e., that "there was some substantial equity in favor of the appellant . . .", the basis of such argument is itself inconsistent with the contention that literal compliance with the rule is mandatory to jurisdiction of this Court.

Thus, in *Harris Lines*, supra, the extension of time allowed by the District Court based on excusable neglect due to failure to learn of the entry of the judgment, reversed by the Court of Appeals for insufficient support in the record, was reinstated by the Supreme Court, which thereupon required that the Court of Appeals hear the appeal on its merits.

In *Thompson*, a Motion for New Trial was not timely filed (two days late). Hence, the extension of time for appeal resulting from the *timely* filing of such a motion was unavailable under the rule. Nevertheless, the Supreme Court set aside the dismissal of appeal ordered by the Court of Appeals, finding the case to fit "squarely within the letter and spirit of *Harris*."

Finally in *Wolfsohn* in a per curiam opinion the Supreme Court set aside the dismissal ordered by the Court of Appeals where the District Court had purported to extend the time within which to file a Motion for Rehearing, although clearly no authority to extend such time was found to exist. The Supreme Court acted on the authority of *Harris* and *Thompson*.

To the same effect, see *Pierre v. Jordan* (1964, 9th Cir.) 333 F. 2d 951, 955, where the Motion was *not*

timely filed but having been heard on the merits by the trial court, was deemed timely filed by this Court in declining to dismiss the appeal.

See also *Lieberman v. Gulf Oil Corporation* (1963, 2nd Cir.) 315 F. 2d 403, cert. den. 375 U.S. 823, 11 L. ed. 2d 56, 84 S. Ct. 62, where the Court of Appeals declined to dismiss an appeal where the District Court had extended the time, on the authority of *Harris* saying that several months prior thereto it would have thought the District Court to be without authority to grant such extension. *Lieberman* was cited with approval in *Thompson*. Herein, at any time prior to May 14th the District Court could have extended the time an additional 30 days without notice pursuant to Rule 6(b). At any time after May 14th, but not more than 30 days, the Court could have extended the time for such 30 days upon noticed motion.

*Conway v. Pennsylvania Greyhound Lines*  
(D.C.C.A. 1957) 243 F. 2d 39.

Hence, the Notice was filed but one day beyond the time provided by Rule 73(a) but at a time when it could have been authorized upon application, had the matter come to the attention of counsel. It is submitted, therefore, that the circumstances set forth in the affidavit of appellants' counsel justify this Court in hearing the matter on the merits.

**B. Effect of Failure on the Clerk to Notify Appellants of Entry of Order Denying Motion for New Trial.**

Rule 77(d) requires the clerk immediately upon the entry of an order or a judgment to serve notice

of entry by mail upon each party who is not in default. It also provides that any party may in addition serve a notice of such entry. The final sentence of the rule provides that lack of notice of entry does not affect the time to appeal or relieve or authorize a court to relieve a party for failure to appeal within the time allowed except as permitted in Rule 73(a).

In the present case, the clerk failed to give notice to the appellants of the entry of Judge Clark's order on March 15 or immediately thereafter. This is shown by the docket entries as well as by the affidavit of appellants' counsel. Indeed, appellants' counsel received no information concerning Judge Clark's ruling until March 29th (14 days after entry thereof).

In *Hill v. Hawes*, 320 U.S. 520, 88 L. ed. 283 (1944) a judgment of dismissal was entered and the clerk failed to send notice thereof pursuant to Rule 77(d). The Court of Appeals had a 20 day rule for notice of appeal. The notice of appeal was not filed until six days after expiration thereof. Thereupon, the trial judge ordered the judgment vacated by reason of the clerk's failure to give such notice and on the same day signed and filed a second judgment. A notice of appeal therefrom was filed seven days later. The Court of Appeals granted a motion to dismiss the appeal. In urging to the Supreme Court that it should not disturb such dismissal the appellee argued that the vacation of the first judgment was an attempt to extend the time for appeal which a District Court could not do. The Supreme Court agreed that a District Court could not extend the time but held

that the clerk's failure to give the notice did affect its validity and finality, stating on page 523:

"It is true that Rule 77(d)<sup>2</sup> does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule."

The judgment of dismissal was reversed.

In *Lohman v. United States* (6 Cir. 1956) 237 F. 2d 645 the Court of Appeals declined to dismiss an appeal where the Motion for New Trial was orally denied, appellants' counsel had approved the form of a written order but the clerk had failed to notify him of its entry. The court said on page 666:

"The general rule appears to be that where there has been a failure or delay in giving notice on the part of the clerk the time for taking an appeal runs from the date of later actual notice or receipt of the clerk's notice rather than from the date of the entry of the order (authorities)."

To the same effect see *Blunt v. United States* (D.C.C.A.) 244 F. 2d 355. The courts in *Lohman* and in *Blunt* cited and relied upon *Hill*.

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<sup>2</sup>The final sentence in Rule 77(d) was added subsequent to this decision at the time of the amendment to Rule 73(a) in 1946. See generally 7 *Moore's Federal Practice* 3115 et seq., 4006, et seq.

In *Thompson*, supra, although the appeal was reinstated apparently because of reliance by the appellants' counsel on a statement of the District Court that a motion for new trial was timely filed, in fact, it was not filed until 12 days after entry of the judgment. Rule 59(b) requires service thereof 10 days after such entry. Hence, extension until after ruling thereon pursuant to Rule 73(a) was not available. The appellant argued that the Motion *was* timely filed because it was filed within ten days after receipt of notice of entry of judgment.

Clearly under the rule stated in *Lohman* the Notice of Appeal was timely herein being well within 60 days after receipt of a copy of the Order of Judge Clark.

There has been no motion to dismiss this appeal. The appellee has responded on the merits. Obviously, no prejudice has resulted from the one day delay in filing. Hence, it is respectfully submitted that the appeal should be heard and decided on the merits.

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## II

### COMMENT ON RESPONSE TO SPECIFIED ERRORS

Appellants will herein confine their remarks to those items in appellee's brief deemed to be significant and will attempt to avoid reiteration of matter set forth in their Opening Brief.<sup>3</sup>

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<sup>3</sup>Omission of comment is not intended to imply agreement with or concession to any appellee statement but rather an effort to avoid undue length, consistent with advice appearing in Federal Civil Practice handbook (C.E.B. (1960) 811).



**1. Exclusion of Defense Sales (Specification No. 1).**

Appellee urges that in making the rulings admitting and excluding proposed sales "the trial court was exercising its discretion . . ." (U.S. Br. 19). However, it was appellants who urged the trial judge to exercise discretion with respect to remoteness of time (R.T. 51)<sup>4</sup> but without success.

**2. Verdict Based on Two Improper Sales (Specification No. 2).**

The citation of and quotation from *United States v. Whitehurst* (4th Cir., 1964) 337 F. 2d 765 (U.S. Br. 23) overlooks important factual distinctions. In the present case the state of mind of the respective buyers is significant. *Whitehurst* dealt with a deceived seller. Moreover, the seller was not deceived as to the property sold but as to the use thereafter to be made of it important to him only because of the effect on other property owned by him.

The argument that appellants were not demonstrably hurt by the use of such sales because subdivision land may sell for more than agricultural land and in this instance was not shown to sell for less is irrelevant. Surely grapes cannot be valued by reference to sales of grapefruit, regardless of which brings the higher price per pound.

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<sup>4</sup>Appellee's characterization of this contention before the trial court as an admission (U.S. Br. 18) thus ignores appellants' argument that the trial court refused to exercise discretion in deference to an erroneous belief in a five year rule of law (Op. Br. 16). Cf. *United States v. Featherston* (10th Cir. 1963) 325 F. 2d 539, 543, where the Commission did not exercise discretion, although authorized to do so, but "Instead, it held as a matter of law the evidence was not admissible". Reversed. Error held prejudicial. *Featherston* is cited by appellee (U.S. Br. 15, 38, 46).



### 3. Denial of Request to Examine Notes. (Specification No. 3).

Appellee cites and quotes from *Phillips v. United States* (2d Cir., 1945) 148 F. 2d 714, asserting it to be "squarely in point." (U.S. Br. 38) However, it cannot be determined from the opinion whether the witness took the appraisal report inspection of which was denied to the stand and referred to it during his examination or merely reviewed it to refresh his recollection prior to taking the stand.<sup>5</sup> The distinction is important, although apparently overlooked by appellee for it suggests in a footnote (U.S. Br. 39) that it is not clear that under California law that appellants were entitled to inspect such notes, citing three California cases. However, in each of these inspection was held properly denied because the witness had *not* taken the notes to the stand and consulted them during testimony but had merely reviewed them in advance thereof.<sup>6</sup>

The case of *Brownlow v. United States* (9th Cir. 1925) 8 F. 2d 711, cited by appellee (U.S. Br. 40) is not in point because there the portions of the notebook referred to by the witness denied to opposing counsel pertained to cases entirely different from the one being tried.

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<sup>5</sup>This case is also reported as *United States v. 80.46 acres in Erie County, et al.*, 59 F. Supp. 876, but no reference to the appraisal report appears in the opinion.

<sup>6</sup>The same factual distinction appears in the other decisions cited by appellee (U.S. Br. 39, 40) *Goldman v. United States*, 316 U. S. 129, 132 (1942); *C. W. Hall Co. v. Marquette Cement Mfg. Co.*, 208 Fed. 260, 265 (C.A. 8, 1913). In *United States v. Easterday*, 57 Fed. 165, 167 (C.A. 2, 1932) whether the notes were referred to on the stand is not clear from the opinion, but reference was to matters concerning defendants not then on trial.

**4. Limitation of Cross-Examination Concerning Ethical Standards. (Specification No. 4).**

Appellee argues that such limitation was within the discretion of the trial court on a "collateral" issue which "plainly was remote." (U.S. Br. 33)

Obviously, the ultimate issue is just compensation based upon market value. But where this is determined largely, if not exclusively, upon the opinion testimony of expert witnesses, matters directly reflecting upon their relative reliability would appear to be direct, rather than collateral.<sup>7</sup>

**5. Limitation of Cross-Examination Concerning Compensation of Witnesses (Specification No. 5).**

Appellee cites and quotes from *United States v. 60.14 Acres in Warren and McKean Counties, Pa.* (Seibel) (C.A. 3 No. 15313, June 24, 1966, U.S. Br. 36) urging that appellants' argument would compel selection of the local rule in all situations. This is wholly at variance with appellants' statement (p. 40) that the federal constitution (and decisional law) on eminent domain would prevail on substantive matters but that otherwise the most favorable rule on admissibility would apply.

The selection of this case (*Warren*) to support appellee's argument is inappropriate for in *Warren* the court did apply Rule 43(a) in exactly the same manner as urged by appellants, as a rule of admissibility. It held the trial court to be in error in excluding evi-

---

<sup>7</sup>Appellee also denies creating the issue of relative responsibility (U.S. Br. 33). The record was cited in Appellants' Opening Brief 33, upon which appellants will stand.

dence admissible under federal decisional law but inadmissible under the state rule.<sup>8</sup>

*United States v. Certain Interests in Property in Borough of Brooklyn* (Fort Hamilton) 326 F. 2d 109, 114 (C.A. 2 1964) cited (U.S. Br. 36) is not in point for it simply upheld the exclusion of evidence of reproduction costs less depreciation as a substantive question and hence governed by federal law only.<sup>9</sup> The same rule is reflected in *Westchester County Park Commission v. United States*, 143 F. 2d 693 (U.S. Br. 36).

*United States v. 93.970*, 360 U.S. 328 (U.S. Br. 37) is not pertinent. It did not involve the admission of evidence. The question was whether a state decisional rule (of equity which compelled an election of remedies) applied which would preclude the Government from maintaining an action to determine whether a lease had been revoked and that defendant had no compensable interest in a specific parcel of land and, if it did, then to acquire it by condemnation. This is clearly substantive.

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<sup>8</sup>There is irony in the fact that appellee urges that the clear language of Rules 71A(a) and 43(a) be disregarded in favor of judicial discretion while at the same time it urges a literal application of Rule 73(a) without judicial discretion (U.S. Br. 11 et seq.).

<sup>9</sup>But this Court approved admission of evidence of a capitalization approach to value in *United States v. Eden Park Association* (9 Cir. 1965) 350 F. 2d 933. Possibly implied by dicta therein is that a similar view would apply to evidence of reproduction less depreciation (p. 935).

**6. Striking Opinion of Snelson (Specification No. 6).**

Appellee's response to this contention not only avoids the issue of law presented but quotes the record out of context in such a manner as to create a distorted picture. In order to clarify one must examine the record for the proper sequence of events.

On direct examination and as part of appellants' rebuttal after Mr. Snelson had testified to his knowledge of livestock farming, of the Black Butte Dam area (R.T. 866) and his knowledge of the two government sale properties, Wilder-Boswell and Wolfe-Petty) (R.T. 867, 870, 873) the following question was asked:

"Q. In your opinion, Mr. Snelson, how would this property No. 6 (Wolfe-Petty) compare with property generally in the Black Butte area based on what knowledge you have of the Black Butte Dam area."

Immediately there was interposed an objection:

"Mr. Renda: Well Mr. Blade, I'm going to have to object to that. It's calling for Mr. Snelson's opinion. Now I have no objection to his testifying as to facts. But this is rebuttal, and I presume that you are attempting somehow to rebut something that the government witnesses said by way of fact. Now, to bring in another opinion is not rebutting fact. And I think this is completely and wholly improper rebuttal, your honor. And I would object to it." (R.T. 873-874)

After some discussion between court and counsel, defense counsel was instructed to proceed and then asked the following question:

“Q. Would you tell me, in your opinion, how does this property, either one of those properties compare for livestock operation with the property in the Black Butte Dam area?

A. The Black Butte Dam area and all of that surrounding area is far superior to anything in the Red Bluff area as far as producing feed for livestock goes.” (R.T. 874-875)

It should be pointed out at this juncture that *no objection* was made by appellee’s counsel to the *answer* given to the question. The argument in appellee’s brief (U.S. Br. 41) that the answer was unresponsive is therefore inappropriate. It may be conceded that the injection of the additional words “anything in the Red Bluff area” went beyond the language of the question which referred to the two sales properties. However, in the course of development of the witness’ knowledge of the two sales properties it was clearly evident to the court and to the jury that the answer referred primarily and essentially to the sales properties Boswell-Wilder and Wolfe-Petty which the witness was asked about and to which his answer was primarily addressed. If there was anything objectionable about the answer as being too broad or unresponsive in some respects, it was waived by the failure of government counsel to object thereto or to move to strike the answer in whole or in part.

Cross-examination then commenced as follows:

“Q. Well, Mr. Snelson, what do you mean by ‘Black Butte area?’ Are you familiar with the Whyler property, not Wilder?”



However, before the witness had an opportunity to answer either of such two questions the court said as follows:

“The Court: I think in view of the objection that I’ll strike his last answer. The jury will disregard it.” (R.T. 875)

The answer so stricken was “his last answer” being the opinion comparing the Black Butte Dam area and the two properties referred to as “anything in the Red Bluff area”. In stating: “in view of the objection” it is clear that the court struck the answer and instructed the jury to disregard it, *not because it was unresponsive but solely by reason of the objection above quoted, to wit, that it constituted an opinion and was improper on rebuttal.*

Although appellants’ brief addressed itself to the question of law posed by the objection and the action of the court thereon, to wit, whether opinion testimony may be introduced in rebuttal, appellee in its brief, has wholly ignored such question. Certain sentences in this portion of appellee’s brief are incorrect or irrelevant. Thus, on page 41 (U.S. Br.) it is said that the “comparability of the two *areas* as such and anything in the Red Bluff area was not inquired into by the Government in presenting its case.” This statement certainly is inconsistent with the presentation of the two sale properties as being most nearly comparable to the subject property upon which Black Butte is located (R.T. 457, 458, 701, 705, 715, 765, 766, 788). The statement (U.S. Br. 41) that appellants did not object to the striking of the answer and that



appellants excused Snelson without soliciting a responsive answer certainly avoids the issue.

Finally, appellee argues that the specification of error is not properly before this Court because not included in the several grounds urged in support of appellants' motion for a new trial. However, a motion for a new trial is not prerequisite to appeal.

*United States v. Hayashi* (9 Cir. 1960) 282 F. 2d 599, 601;

*Morgan Electric Co. v. Neill* (9 Cir. 1952) 198 F. 2d 119;

*Woods v. National Life and Accident Ins. Co.* (3rd Cir. 1965) 347 F. 2d 760, 763-764.

Hence, the omission of this item from grounds urged in the motion for new trial is immaterial. The cases cited by appellee in support of this contention (U.S. Br. 42) do not support it. In *United States v. Benning*, 330 F. 2d 527, 535 (C.A. 9, 1964) the commissioners had rendered a report. The appellant had an opportunity but failed to object to the entire report. This appears to be tantamount to raising an objection to an issue for the first time on appeal. It is the appellee who on appeal raises for the first time a question as to whether Snelson's answer was responsive. Appellants presented their position in the trial court by asking the question and urging to the court the propriety thereof (R.T. 874). The action of the court was simply a ruling, although belated, in favor of the objection. Nothing further on the part of appellants is required (Rule 46). The same criticism may be made of *Pehrson v. C. B. Lauch Construction*

*Co.*, 237 F. 2d 269, 270-271 (C.A. 9, 1956) (U.S. Br. 42) where there was no objection to a question and no specification in a motion for a new trial so that the complaint was made for the first time on appeal.

The statement (U.S. Br. 42) that "appellants had full opportunity without objection to explore with Snelson on rebuttal his opinion that the Wilder-Boswell and Wolfe-Petty *sales*—not *areas*—were not comparable to Tract 104" is contrary to the record.

**7. Failure to Give Instruction and Comment Upon Sales and Opinion Evidence (Specification No. 7).**

Appellee's argument concerning all of the instructions is purely argumentative and requires no further comment except to disagree and rely upon the contentions made in Appellants' Opening Brief.

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**CONCLUSION**

For the reasons advanced in their Opening Brief and above, appellants respectfully urge that the verdict be set aside and a new trial awarded.

Dated, Oroville, California,  
December 3, 1966.

Respectfully submitted,

BLADE & FARMER,

By ROBERT V. BLADE,

*Attorneys for Appellants.*

FEB 14 1967

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

REUBEN G. LENSKE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLANT'S OPENING BRIEF

---

from  
ORDERS OF  
THE UNITED STATES DISTRICT COURT  
for the  
DISTRICT OF OREGON

---

Reuben G. Lenske  
Attorney pro se  
1014 S.W. Second Avenue  
Portland, Oregon

FILED

DEC 4 1965

FRANK H. SCHIND, CLERK



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Note - Argument follows each specification of error without special designation as such.



# APPELLANT'S BRIEF

from

ORDER DENYING PREJUDICE

and from

ORDER DENYING MOTION FOR NEW TRIAL

## STATEMENT OF THE CASE

My appeal from the original judgment and statement of jurisdiction will be found in file No. 19539.

Following are the taxes alleged owing (CR 1, 19539) and the corresponding findings (CR 1072, 19539) by the court:

Year	Count	Indictment (CR 1, 19539)	Finding (CR 1072, 19539)
1955	I	\$18,933.14 taxes	\$ 414.78
1957	II	14,479.38 "	1,006.18
1958	III	<u>7,736.18 "</u>	<u>4,682.99</u>
Total		\$41,148.70	\$6,103.95
Estimated and withholding taxes paid F 4-K Ex 18, 19 & 20)			<u>2,466.30</u>

Balance owing on taxes found payable after crediting withholding and estimated taxes paid \$3,637.65

Count IV alleged the making of a false return. The indictment stated that I had income of \$564.41 for the year 1956 and the Court found that I lost \$9231.59 that year but held me guilty because that was \$708.58 less than the amount of loss I reported.

During these same four years showing underpayment of \$3637.65 of taxes, I gave \$3,619.13 (F 4K 243 and Cr 1107, 19539), almost the same as the unpaid taxes.

Also, during those same four years I directed that \$21,316.00 more be paid out of our law partnership income to my two junior but equal partners than to myself (F 4-0, 19539).

During those same four years numerous mortgages and contract receivables were substantially delinquent but I did not commence even one foreclosure. (See references in Appellate Brief \*page 3, 19539)

My living expenses (CR 1107, 19539) were no more than those of an ordinary working family and I made no expenditure for luxuries such as new home, new automobile, new furnishing, jewelry, liquor, gambling, etc. (CR 1107, 19539).

There is not one stitch of evidence of motive, need or inclination to avoid paying \$3637.65 or any other sum in taxes during those four years. During the same period I paid out in the neighborhood of \$100,000 in real property taxes without having made even one protest or one appeal. See assessors' records, F 139-143, F 115-132, F 500, 506, F 538, F 557-8, E 100 F 4K. (If I aimed to avoid paying taxes it would show up in the \$100,000 area instead of or at least along with the \$3600 area.

My returns were prepared openly and honestly by competent and reliable persons. (CR 944, 19539 and 2/15/63, Vol. 1, pages 43, 44 and 94 to 104, 19539).

On February 15, 1965, I filed a motion for new trial consisting of 41 pages of affidavits and exhibits, CR 1 - 41, and on April 8, 1965, supplemental affidavits and exhibits, CR 58a to 58p, and on August 13, 1965, supplemental affidavits and exhibits, CR 83 to 87.

On August 4, 1965, the motion was set for hearing before the Honorable James M. Carter on August 13, 1965. On August 6, 1965, I filed a notice of intent to file an affidavit of prejudicial

against Judge Carter and on August 11, 1965, I filed such affidavit. On August 13, 1965, Judge Carter made an order denying prejudice. I filed a notice of appeal from the order but Judge Carter proceeded with the motion for a new trial the same day and denied it. From the order denying prejudice and the order denying the motion for a new trial appeals were duly taken.

#### Abbreviations

I shall refer to the transcript of proceedings that occurred on August 13, 1965, consisting of one volume of 139 pages as (Tr). I shall refer to exhibits as Ex and to folder numbers as F. Wherever I refer to a transcript of the original appeal file I shall give the volume number, date, page and this court's file number, 19539, this (Vol. 57, 4/21/64, 2669, 19539).

#### Bertrand Testimony

Because the record in 19539 is so prolix and because I consider the Bertrand specification (11, a., (1)), *page 45* so vital I am having three copies of all of her testimony *(and filed)* and the opposing testimony of Glenn Tellgren compiled in a separate volume as a separate transcript; *also Department Exhibit 100*

#### Appendix

To the appendix I am affixing excerpts from the record showing that my returns were openly and honestly prepared.



## Breakdown of Specification 11

11, a., (1)	Eleanor Bertrand \$3911.12 and \$2500 reductions of 1957 net worth, wiping out 1957 deficiency	Page 43
11, a., (2)	Doan \$28,500 from Lloyd Corporation resulting in reducing 1958 net worth by \$19,950 and a part of \$8,550, wiping out 1958 deficiency.	56
11, a., (3)	Elmer Kolberg, Government appraiser, additional grounds for striking his testimony, which would wipe out all counts.	61
11, a., (3 $\frac{1}{2}$ )	Cimarron Insurance Co. check for \$2500 deposited June 24, 1958 and Florida check for \$5000 deposited May 1, 1958, reducing 1958 net worth by \$7500.	37, 38
11, a., (4)	Pierce properties, checks show it was not uncommon for me to issue checks for income taxes for other people, affects 1958 and intent.	63
11, a., (5)	A.L.Prater, shows \$1932.69 reduction item and failure of agents to follow up leads.	64
11, a., (6)	Aremel depreciation, \$1460.00 per year	66
11, a., (7)	L.W.Taylor worthless mortgage reduces 1957 or 1958 net worth by \$2000.	67
11, a., (8)	Rebecca Tarlow, reduces 1956 net worth by \$5000, shows agent substantially wrong in other years	68
11, a., (9)	W.K.Royal testimony, affected title to Folder 43 property and my credibility and showed Government produced two perjurious witnesses on that one item	7
11, a., (10)	Court's newly expressed finding entitles me to additional \$1500 reduction in net worth.	72



## Specification of Error 1

The court erred in denying my motion and affidavit of prejudice.

28 USCA 144

My affidavit of prejudice appears on pages 61 to 75 of the Clerk's Record. I ask the appellate court to read it. The prosecution has filed no counter affidavit and my affidavit must be taken as true. The only question for the appellate court to decide is whether under those uncontradicted facts I would obtain a fair and impartial hearing before Judge Carter on issues arising from my original motion, affidavits and exhibits on pages 1 to 41 of the Clerk's Record filed February 15, 1965, pages 58(a) to 58(p) filed April 8, 1965 and pages 85 to 87 filed August 13, 1965. I ask the court to read these 62 pages and then to read the summaries on pages 3, 4 and 5 of the Clerk's Record and then to review the Affidavit of Prejudice commencing on page 61.

The intemperate language by Judge Carter at the early part of the hearing (Tr 9, 11, 14) which included "...just pick up your papers and walk out" and the allotment of five minutes to cover four major items of my motion (Tr 138), the misconceptions of the fact in the record, as I shall show under specification 10 confirm the prejudice.

Court evidenced prejudice by silence

The court sits as a jury whenever it decides questions of fact. It sat silent when Mr. Alexander said (Tr 94) of me

"This is a con man we are dealing with."

(line 20) "We are dealing with a con man and nothing else."

What would a judge trying a criminal case before a jury do when a prosecutor made such statements before a jury? He would castigate the prosecutor and declare a mistrial. Only a prejudiced judge would sit mute - and inferentially accept the statement as evidence.

And when I said: (Tr 95)

MR. LENSKE: Again, Your Honor -- I'm the con man, but who is withholding evidence? They are withholding evidence; not me. (excuse the grammar) I'm trying to present all the evidence to the Court, and I'm the con man.

When I gave the court an extra opening to relieve me of the false and prejudicial charge of being a con man the court continued to show prejudice by its silence on that score

Court again shows prejudice in words

The Court's response was: (line 16 Tr 95)

THE COURT: You would like to retry this case, starting now, and take witnesses for two or three weeks.

The court's prejudicial attitude towards me is brought in focus when it is observed that <sup>an hour and</sup> some minutes previously the following occurred: (Tr 73)

THE COURT: Do you propose to take all afternoon  
on this matter?

MR. LENSKE: I think I would...

THE COURT: What do you propose, that we meet tonight  
or tomorrow?

MR. LENSKE: I would agree to either one...I'd rather  
be finished tomorrow morning instead of tonight.

However, the court's prejudice was evident throughout.

THE COURT: I don't know whether I'm going to let you  
call witnesses or not. I don't propose to let this thing  
go on forever.

To a judge who is impatient because of prejudice,  
"forever is a day".

THE COURT: (Tr 88 line 21) You are referring to that statement about whether you cooperated or not?

MR. LENSKE: Yes.

THE COURT: They weren't able to pin you down to show what period you really were talking about.

Here again the court shows how its prejudice has blinded its conception of the facts. In my affidavit of August 12, 1965 (CR 85) appear the following contrasting quotes from George Nyman, one of the two agents whose testimony were the sine qua non of the indictment and the judgment against me.

George Nyman's testimony on March 23, 1963, Vol. 25, page 87 of transcript of Criminal Case:

"...so I had to take any information you were giving to try to compile your net worth, since you were not giving me any full cooperation."

George Nyman's testimony April 27, 1965 (Ex B)

"Q Well, was the situation different when you were under the Intelligence Division as to cooperation and your right to take documents for photostating?

A There was no difference in the situation. You were giving full cooperation."

The court's prejudice against me should be evident. I caught one of the two key Government witnesses in a wholly inconsistent statement on an important point relating to the agents' stealing of my documents. I was the questioner, not the witness, who was free to give whatever answer he chose; and yet the court puts the shoe on the wrong foot when it says the witness couldn't pin me down.

I make the following summary on this specification.

I notified the court immediately after I received notice of the setting of the motion before Judge Carter that I intended to file an affidavit of prejudice (CR 126).

Upon peremptory denial of my motion and the filing of my notice of appeal the court should have, in the exercise of due process, given me an opportunity to petition the Circuit Court of Appeals for a writ of mandamus.

After the appeal from the original judgment was perfected Judge Carter no longer had jurisdiction over the case and therefore his advocacy before the appellate court was not a judicial act but constituted a partisan act directly against the interest of appellant. See the exhibits on pages 76 to 80 of the Clerk's Record.

Many of the rulings of Judge Carter in the trial were not mere errors of law but constituted prejudicial acts.

A reading of my affidavit of prejudice plus the transcript of the hearing on my motion must lead to the conclusion that I could not and did not receive a fair and impartial hearing from Judge Carter on my motion for a new trial.

To deny the right to present witnesses and cross examine  
witnesses present in the court/<sup>room</sup>in the face of recent U. S. Supreme Court decisions guaranteeing confrontation under the Sixth Amendment must stem from prejudice.



## Specification of Error 2

The court erred in proceeding to hear my motion for new trial after the notice of appeal was filed.

28 USCA 144

Amendment VI U. S. Constitution  
(Due Process)

The statute permits only one affidavit of prejudice in a case. Judge Carter knew promptly after he set my motion for new trial that I intended to file an affidavit of prejudice against him (CR 126). It was apparent that he knew he was going to deny my affidavit (TR 1, 6 and 7). The Circuit Court of Appeals does have jurisdiction once an appeal is taken. I should have been given, in the exercise of due process, time within which to obtain a writ of mandamus to obtain an immediate adjudication of the sufficiency of my affidavit of prejudice.

Since the Circuit Court of Appeals must have found that their face my affidavits and exhibits in support of my motion for new trial do show grounds for such motion when it remanded the issue to the District Court, I should be placed in the same position now as I would have been if the trial judge had followed due process, i.e., submit the issues on my motion for a new trial to a disinterested judge.



## Specification of Error 3

The court erred in denying me the right to adduce live evidence in support of my motion for new trial.

Amendment V, U.S. Constitution  
Amendment VI, U.S. Constitution  
In re Oliver, 333 U.S. 257, 273

The statute makes no restriction on the type of evidence a defendant must present in support of a motion for new trial. Due process would therefore entitle a defendant to present evidence as it is commonly conceived in our courts of law. An ex parte affidavit is not the best method of presenting evidence but is intended to afford a practical means of getting facts before a court as an initial step to show both good faith and substance. But this is not the end. The opposition may file counter affidavits. Either side may then cross-examine the makers of the affidavits. To do otherwise would do violence to our whole system of open justice.

There is another reason for live testimony, not only from persons whose affidavits have been filed but from other witnesses. Not all persons are willing to sign affidavits. Some persons wish to give the impression of complete neutrality in any controversy. They are willing to give evidence but only in open court in the presence of both sides. Surely the pertinent testimony of such witnesses should not be eliminated in an issue that arises under 3 USCA 144.

Some people are afraid to give affidavits that could be construed to favor a litigant and disfavor the United States Government and especially the Internal Revenue Service or the FBI or

the Department of Justice. Such person's relevant testimony should not be excluded in any case, certainly not where a man's freedom is at stake.

Some witnesses are biased in favor of the Government and against a defendant. They will give affidavits to the Government and none to the defendant. A defendant should not be deprived of their testimony. Their testimony can be obtained by examining them in open court. To deprive a defendant of the right to examine witnesses in open court is to deprive him of life, liberty or property without due process.

The Supreme Court said in *In re Oliver* at page 273:

"A person's right to ... an opportunity to be heard in his defense - a right to his day in court - are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."

The right to examine and cross examine witnesses is, therefore a fundamental and constitutional right and not a discretionary one for the court to decide. However, if it were discretionary the Court abused its discretion in view of the fact that Deschenes had been evasive not only in the depositions in the civil case but also in this case in chief. The same, of course, was true of Nyman and his inconsistent statements. Brady was insolent and insulting in his deposition in the civil case and simply refused to respond to the subpoena served on him for the hearing of August 13, 1965.

Deschenes' Evasiveness

Vol. 49(A), 7/17/63, 19539, page 1166

Mr. Burdell asked Mr. Deschene a direct question, whether (line 8) "in the course of preparation of Exhibit 820 as well as 820 first amended," Deschenes "used the duplicate deposit slips, including notations as to the source of the receipts."

At first Deschenes said he used them as a "reference source" (line 12).

Then he said he "used them as a guide" (line 14).

Finally Mr. Burdell succeeded in pinning him down:

Q (line 15) You based some of the figures on those deposit slips, did you not?

A That is correct.

I see no criticism of Deschenes basing some of the figures on the deposit slips but this bit of questioning should cast doubt on the honesty of the sine qua non of a case against me.

Deschenes' Evasiveness

page 1166 line 24

Q And in some cases it is correct, is it not, that in order to find an item you would commence with the notation or the entry on the December 31, 1958 net worth statement and then work backward from that entry; isn't that correct?

A Well, I don't know. Do you have any particular case of that?

Finally, when Mr. Burdell pinned him down to the(F 236) Meljie item Mr. Deschenes said, page 1168, line 6:

A Yes I did.

Mr. Burdell tested Deschenes on another item, V-1, Isabella L. Bruce and asked him (page 1168, line 25), "did you use the same procedure with respect to that account?

A On that one, I had the known balance 12/31/52 (should be 58, see page 1171 line 7)...I worked it back on the deposits I found...and on the basis of that I arrived at the balance.

Q In the Exhibit V-1 there is a deposit slip, is there?

A Yes, there is.

Q And attached to it ...is a reference to payment by Isabella L. Bruce?

A Right.

Q Did you take into consideration that payment in arriving at your figure?

A No, I overlooked that one.

Q What was the effect of overlooking it on the net worth statement?

A I understated the liability by about \$100 (should be \$500).

Q And the effect on income?

A Well, it would overstate the income by \$500.

Q That is, it would overstate the income as shown on Government's Exhibit 820 or 820 first amended?

A Yes.

THE COURT: What was the amount of the deposit overlooked - \$500?

THE WITNESS: Five Hundred dollars.

Deschenes' Evasiveness

page 1171, line 11

Q Now, on a number of these items that are in the net worth statement you did follow the practice of commencing with the final net worth statement and working backwards, did you not?

A No, I used the documents wherever they were available.

Q But if you didn't find the document, in those cases you would use the 1958 net worth statement and work backwards from it, did you not?

A Do you have a specific instance? There are so many items in this net worth, I can't keep track.

Q I gave you two. I don't want to go over each one.



I want to ask you if in general you followed that practice in other instances.

Q (page 1172, line 4) I will limit the question this way; Did you follow that practice in other instances in addition to the two that I brought to your attention?

A I can't recall right now without some ----

Q You mean you don't know whether you did or not?

A I don't recall.

#### Deschenes' Evasiveness

Q (page 1172 line 10) You also had a net worth statement as of December 31, 1954, did you not?

A Yes, sir - if that is the one prepared by Mr. Cauthorn.

Q That is the one I have reference to. I think it is Exhibit 190. In some cases you used that net worth statement and worked forward, did you not?

A Do you have some references of that, too?  
I can think of a couple.

Q I am trying to find out what your method was of preparing a net worth statement. I don't want to go into every example. I want to know if in general you used that method.

A I used those as anchor points. I didn't necessarily use them.

Q You didn't necessarily use them?

A No.

Q Did you at any time use them?



10  
A I might have, if you can recall some example that I can refer to.

Q As of now you mean you don't know?

A Well, I just can't say. I mean, there have been so many items in this net worth and so many transactions by the defendant that it is kind of hard to really keep up with it.

Q But in the preparation of a net worth statement for purposes of a criminal tax trial, regardless of the number of items, you would have a method which you would follow, would you not?

A I used the documentation that was presented and the witnesses in this court.

Mr. Deschenes continued to evade (page 1174 and 1173) until he was asked by the

THE COURT: And that is the way the question now stands: Did you use it to check? Did you use it as a starting point?

THE WITNESS: I'm sure I used the document in this case that has been presented here.

Deschenes continued to parry (line 15 page 1174) and then: (page 1175)

Q But the peg that you would use for the beginning net worth figure as of December 31, 1954, would be the

Cauthorn net worth statment, which is Exhibit 190; is that not correct?

A I wish you would state that again, please.

Q Yes. The peg or the base or the evidence which you would use for establishment of the December 31, 1954 net worth, which we call the beginning net worth, in some cases was the Cauthorn net worth statement which is Exhibit 190; is that not correct?

A I could have. I can't say for sure. I could have.

Q Are you saying that as of now you don't know whether or not in some cases that was the only document that you had to use in order to establish the beginning net worth in this

A No, there has been the testimony of witnesses here, and there has been documentation put in by them, and I am sure that all of those were considered.

Q In establishing the beginning net worth?

A The beginning net worth.

Q Now, we are referring to the Cauthorn net worth statement, which is Exhibit 190 (handing document to the witness). There is a figure under the heading "Assets" and under the subheading "Partnership Interests" designated as "Lava Motel," in the amount of \$7,589. Did you use that figure

A I will have to look at the summary sheet. Have you got the folder number?

Q We will find it for you. Folder 141. Look at page 11 of Exhibit 820.

Q (page 1176 line 23) Did you use that figure?

A Yes, I did.

Q (page 1177) Do your notes show that you used anything except that figure for the beginning net worth?

A That is what I used -- Mr. Cauthorn's statement.

Q My question is, did you use that figure and only that figure?

A As of 12-31-54.

Q Right. And did you do anything to verify the accuracy of Mr. Cauthorn's figures or his figure with respect to that item?

A No, I didn't.

Deschenes parried and then again admitted (page 1177):

Q I had better repeat that question, I guess. Were there cases where you used only an anchor at one end, without using the anchor at the other end? And by the term "anchor" I am talking about the two net worth statements that we have been talking about.

A Well, in this case I just used Mr. Cauthorn's net worth as of 12-31-54.

Q At the beginning?

A Right.

Q (page 1178 line 10) In that case, (F 236 page 5, schedule C) you used the anchor, that is, what you would

call the anchor, of December 31, 1958, that is the net worth statement of December 31, 1958, did you not?

A Yes, I did.

Q What did you use, if anything, for a beginning net worth statement or for a beginning net worth anchor or base?

A In the case of Isabella Bruce I just computed it back on the known deposits.

Q So that (page 1179 line 6) in the case of Folder 236.. let's take as a hypothetical illustration, if in the year 195 you overlooked a deposit slip, then the ending figure for 195 would be inaccurate would it not, as it was in the Miljic case?

A If I overlooked a deposit in 1958 ----

Q Right.

A -- the ending balance would be understated.

Q Or, aside from overlooking deposit slips, if a deposit slip were lost or misplaced or anything of that sort and you didn't find it, that would result in the same inaccuracy, would it now?

A Based on your assumption, yes.

Deschenes and Nyman should have had  
more accurate knowledge of my case

Q (page 1181 line 10) Now, you worked on this case about two and a half years, as I understand; is that right?

A Yes.

Q And during a substantial portion of the two and a half years you worked on it fulltime; is that right?

A Yes.

# EFFECT OF FOREGOING TESTIMONY

OF

ALBERT DESCHENES

The net effect of the foregoing testimony of Albert Deschenes when considered in connection with the affidavits of Richard D. Bennett, Winnifred Jones and O. G. Larson (CR 19 to 24) and the \$2500 deposit of June 24, 19 in my account of the Cimarron Insurance check and the deposit of May 1, 1958 of \$5000 (Exhibit S-1) of the Florida bank check for the same beneficiary is as follows.

1. Deschenes was evasive in his testimony.
2. Either he failed in his duty to follow up the leads given him by me through the deposit slips on two major (Ex S-1) items totalling \$7500 in the year 1958 or
3. He deliberately overstated my net worth at the end of 1958 in the sum of \$7500 on account of those two items and
4. Because of:

a. incompetence or

b. evil motive or

c. zeal in accomplishing an end result regardless of means,

proved his utter lack of qualification for the preparation and introduction of a net worth statement (820 and 820 first amended) as a disinterested expert.

It is important to remember that court admitted the net worth statement on the basis of Deschenes' testimony and accepted whole the majority of the items on it without



question whenever the specific item was not disproved by me or my accountant. It must be remembered that this is the same mastermind who made up the Rebecca Tarlow statement ( Ex W 2358, F 226) which was \$5000 wrong for one year due to one single omission and also wrong for each of the other years in issue. This is the same Albert Deschenes who had Mrs. Tarlow sign the statement which virtually became the evidence when she was a patient in a hospital. This is the same Albert Deschenes who masterminded the false affidavit of Eleanor Bertrand. This is the same Albert Deschenes who stole from my files numerous documents and made an affidavit that, after returning 193 of such stolen documents, he no longer had any of my documents; yet produced an original such stolen document at the last session in court. This is the same Albert Deschenes who also produced in my recent suit against him microfilm of documents that he knew were stolen from me (about 250 such documents) and that he retained secretly in his files when he made the affidavit that he had no documents belonging to me. This is the same Albert Deschenes who interviewed over 500 persons in his investigation, recommended my prosecution, and then pretended such disinterestedness and expertness that he was able to and did prepare the net worth statement from the evidence in the case. Were his mind and magnanimity so great that he could separate his guilt conclusion



long before prosecution and all the hearsay he gathered during investigation from the testimony at the trial?

### Deschenes' use of Anchors

Deschenes' competence or at least the method he used in arriving at the net worth statement were so faulty in another respect that the Government net worth statements should be stricken. There are two reasons for this in addition to the ones previously given.

1. Deschenes used as one anchor for the beginning (Dec.31,1958) net worth the Cauthorn net worth statement (Ex 190). For the other end, (Dec. 31, 1958) he used Ex 2372. He did not tie them together, i.e., he did not trace each item on each statement forward or backward from one to the other. He admitted to two or three specific examples that he did not corroborate, such as Lava Motel, \$7,589 (Vol. 49 (A), 7/17/63, 19539, page 1177). This method was obviously faulty and insufficient to make a prima facie case.

2. My so-called net worth statement as of December 31, 1958 was not a net worth statement but a compilation of properties I owned or managed with approximations only for the sums, costs, etc. This is not a financial or net worth statement upon which a criminal conviction can properly be based and Mr. Deschenes admitted he used some of the items on it for that purpose without corroboration.

This is exhibit 2372, Folder 513. It was dated October 18, 1961 and reads in part as follows:

"I have intentionally compiled to the best of my ability all properties administered by me with my best estimated cost of those properties to either myself or the correct beneficiary. In some cases I have named a designated trust beneficiary, and in some I have not." It is not my intention to claim property as my own which I had at all times acknowledged to be that of others. However, my including comprehensively all properties being administered, I would like to avoid criticism for omissions."

Also the following is paragraph 6 of the instrument used by Mr. Deschenes and accepted by the court as an anchor point and as my own financial statement:

"Many of the obligations are trust obligations besides those specifically mentioned as such and many of the assets are designated as specific securities for designated liabilities or trusts."

Mr. Deschenes, the prosecution and the Court used this instrument as an admission against interest and in the nature of a confession. I have found and know of no authority that permits such a document to be used for such legal purpose.

## Specification of Error 4

The court erred in admitting in evidence carte blanche depositions that were taken in a civil case.

## Amendment V U.S. Constitution

I sued Government agents for possession of documents that they stole from me.\* John Brady, Albert Deschenes and George Nyman are three of the defendants in that case. I took their depositions and discovered that John Brady had stolen from my office at least 50 documents which he turned over to Deschenes and Nyman. I took the depositions of John Brady and George Nyman and Mr. Alexander, the prosecutor, took the deposition of Albert Deschenes in that case. I believe that selective, pertinent, relevant statements under oath on prior occasions could be introduced as evidence for impeachment purposes, etc. but that such introduction should be confined to the relevant evidence and that to throw into the record complete depositions which may and in this instance does contain prejudicial and a maize of irrelevant matter is an abuse of discretion.

One of my contentions in my appeal in chief is that I was treated in a wholesale, carte blanche manner by the court and this is further evidence towards that end. The depositions are designated A, B, C, D and E.

Since the court is the trier of the facts in this proceeding and admitted the depositions carte blanche (without their even being shown to defendant for examination) it may be presumed that the court was influenced by the irrelevant and prejudicial matter in

\* A, B, C, D and E

the depositions.

TR 81

THE COURT: Objection sustained. (to the taking of John Brady's testimony). The deposition will be made a part of the trial for the purpose of this motion for a new trial.

TR 89

MR. ALEXANDER ... I think we should have all the depositions attached to the proceedings...

THE COURT: We will attach the Nyman's deposition and file it as part of these proceedings. Was there a deposition taken from Mr. Deschenes also?

MR. ALEXANDER: Yes, Your Honor. I will be happy to have it attached also.

THE COURT: You may attach it also.



The court erred in requiring me to make an oral offer of proof relating to testimony I expected to elicit from adverse witnesses present in the courtroom.

Amendment V, U. S. Constitution

Tr 82

THE COURT: What do you want to prove by Mr. Nyman? Don't you have an affidavit with respect to Mr. Nyman?

MR. LENSKE: Yes, I have, Your Honor. I have made an affidavit with relation to Mr. Nyman and Mr. Deschenes. They are both here in the Courtroom. I would ask the Court not to require me to disclose my examination of them in advance, because I believe what information I should obtain from them will be more cogent if it is gotten fresh without giving them warning as to the way I intend to ask them.

THE COURT: Do you want to make a showing as to what you would elicit from them?

MR. LENSKE: If I do that, I will disclose to them the nature of my examination of them. It will lessen the effectiveness of the testimony that I hope to be able to elicit from them.

THE COURT: I am not going to take any testimony unless you make proof on the record.

MR. LENSKE: I want to object to that requirement; but I have no choice but to comply with it. I believe in proper discretion in the status of my case that the Court should properly let me proceed.

with my testimony in my own way, rather than restrict me in a place where I cannot examine them without disclosing to them what I want to examine them about.

THE COURT: What do you propose to do, make an offer of proof here or not?

MR. LENSKE: Well, since I evidently am required to do so, I want to show both Mr. Deschenes and Mr. Nyman made false affidavits regarding records of mine which are on file here now. The affidavits were made in September, 1962, <sup>(CR 44, 19539)</sup> and part of the record of this case which they said -- they both said they had no records of mine in their possession, or under their control. I think there was -- I forget the exact wordings. I want to show that at the time they made those affidavits, although they had sent me 193 documents which they had surreptitiously taken from my files, they then had them in their possession, and had them microfilmed -- approximately 250 pages of documents which they received from Mr. John Brady and which they knew were stolen from me by John Brady; pursuant to a program John Brady has followed in this District of stealing documents from taxpayers and turning them over to the Internal Revenue Service.

I will show by testimony that Mr. Nyman and Mr. Deschenes had in their possession this microfilm; that they saw the originals of some of those documents; that at the present time, and ever since some date in 1960, they have had possession of, and now have possession of, one of my documents which they did not produce pursuant to my motion to inspect, and it was not produced at any time.

THE COURT: What document is that?



MR. LENSKE: It's a document that they have admitted they have in their possession, regarding a timber contract. I would have to see it in order to give further details regarding it. I want to show through Mr. Deschenes and Mr. Nyman that they testified falsely regarding Exhibit 2184, which is the exhibit Your Honor felt justified my conviction. I want to show through their testimony that this was a stolen document -- known to be a stolen document, and the testimony they gave concerning it was inconsistent with the facts as they are.

I have already shown -- I have already shown -- I have attached to my affidavits a photostatic copy of one of the links in their testimony. It's a memorandum that Mr. Deschenes testified -- identified the date when he took the exhibit from my office -- from my building -- I should say from my file. I want to give further and more comprehensive testimony regarding this link in the chain of false testimony which Mr. Nyman and Mr. Deschenes have given regarding the testimony of my document, and the basic reason for it. These are in conformance of the testimony referred to in my affidavits. I have important tying links and amplifications which I believe the Court, in an unprejudiced manner and in exercising of his duties, should give me an opportunity to present.

This paragraph was added later and refers to a subsequent point. In using the Cauthorn (Ex 190) net worth statement without tying the item to my so-called net worth statement and vice versa, as Deschenes testified he did, I am being criticised and convicted for not using a double entry system of bookkeeping but Deschenes failed to use a doubly entry system in preparing my net worth.

The court erred in denying me the right to cross-examine a witness present in the courtroom whose ex parte affidavit was filed in opposition to my motion for new trial. (Albert Deschenes

Amendment VI U.S. Constitution.  
Pointer v Texas, 380 U.S. 400, 404  
Douglas v. Alabama, 380 U.S. 415, 418, 419, 42

In opposition to my motion for a new trial the Government filed an affidavit signed by Albert Deschenes (CR 48).

Albert Deschenes was present in the courtroom at all times on August 13, 1965 and I sought to have him testify.

Tr 91

MR. LENSKE: ...At least Nyman and Deschenes are here. Your Honor can get the full story of what the facts are relative to it. So, I beg the court to permit me to examine these people witnesses regarding the items which I have already made some statements in my affidavits and motion for a new trial.

Tr 92

THE COURT: Objection sustained. I'm not going to hear Deschenes or Nyman today.

Pointer v. Texas, page 404, Opinion by Justice Black,

"And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case."

## Specification of Error 7

The court erred in denying me the right to cross-examine a witness whose deposition in a civil proceeding the Government had previously taken and which was introduced in opposition to my motion for new trial (Albert Deschenes).

## Specification of Error 8

The court erred in denying me confrontation of witnesses whose testimony in a civil case was introduced in evidence by the Government and who were present in the courtroom at the time I was presenting argument and evidence in support of my motion for new trial. (John Brady, George Nyman, and Albert Deschenes).  
 Pointer v Texas, 380 U.S. 400, 404  
 Douglas v Alabama, 380 U.S. 415, 418, 419, 423  
 Amendment VI U.S. Constitution  
 Estes v. Texas, 381 U.S. 532, 540, 558, June 7, 1965

The Sixth Amendment to the U.S. Constitution guarantees an accused the right

"to be confronted with the witnesses against him."

and

"to have compulsory process for obtaining witnesses against him;"

On page 540 of Estes v. Texas Justice Clark says:

"Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the sine qua non of a fair trial."

In a concurring opinion Chief Justice Warren said on page 558:

"As the purpose of trial as a vehicle for discovering the truth became clearer, it was recognized that the Defendant should have the right to call witnesses and to place them under oath...."

\* John Brady was subpoenaed but refused to appear.

## Importance of Cross Examination

Mr. Alexander, the prosecutor, sought to substitute his argument for my right of cross examining Deschenes, Nyman and Brady. But even that argument bears examination. He says that the affidavits of Deschenes and Nyman (Tr 85, line 1 "were true and correct affidavits." He also said (line 13):

"The duplicate documents were turned back to the defendant. All the Government had at that time was microfilms given to them by Mr. Brady. Mr. Brady might have had the defendant's documents."

"Mr. Brady, in the very deposition the defendant points out, says he got all of his originals back. He gave the Government microfilms; although, there is some conflict. He contends he can't remember making the microfilms; but he that as it may, the point here is, there weren't any of the defendant's documents in the Government's possession at that time."

But I sought to show through cross examination and other evidence locked up tight in the fists of the Internal Revenue Service and the Justice Department that John Brady had been for the past ten to twenty years an agent of the Government; and, furthermore, that he got and held those and other documents of mine at the behest of the Internal Revenue Service.

And I contend that the Government does have possession when it takes or knowingly receives my records that were stolen from me and directs or permits the originals to be destroyed or concealed after copies (what is the difference



between a photostatic copy and a microfilm copy?) are made and delivered to and kept by the prosecuting agent (Deschenes).

Mr. Alexander goes on to say: "The only thing they had were microfilmed ones, and the other documents that counsel just referred to, which is a 1960 timber agreement. That agreement the defendant was told about in a deposition; I believe it was the deposition of Mr. Deschenes."

Surely this is a proper subject of cross examination. If Deschenes and Nyman did not testify falsely when they said they had no documents of mine while they knowingly held microfilm of mine, did they not falsify when they had one original document? Is this typical of what Mr. Alexander considers "true and correct affidavits"? And if they lied about one document why not permit me under the right guaranteed under the Sixth Amendment to the U. S. constitution to ascertain whether they lied about another one?

#### Doctored Evidence

A key item in my case was Exhibit 2184. I claim it was irrelevant, in no way improper and had nothing to do with my net worth or my taxes. But the trial court saw fit to "hang" me because of it. It is therefore a very important document. It was a key exhibit before the grand jury as well as the court. I claim it was outright stolen from me by the Internal Revenue Service. Deschenes claims that my secretary gave him the file that contained that exhibit. My secretary testified that this document was never in the file that Deschenes said

(Vol. 42, 42/60 pages 73 to 74, 11532)

50  
was given to him. Deschenes admits he took that document out of my office surreptitiously, photostated it and returned it to the file. When asked when he took (he or Nyman) one hundred ninety-three documents from my files that they kept for several years (also surreptitiously) he could not give any date for the taking of any of the numerous documents.

But one document, Exhibit 2184! Deschenes could and did give the date he took that. How could he tell? He had a memorandum. Out came the memoranda, all seventy pages of them. This group of typewritten pages was all carbon copy, all seventy pages; except the bottom note (CR 8) on one page. This was the key note from which Deschenes could tell about the file that contained the original of Exhibit 2184. This note was not in carbon but in original typing. The deposition of Deschenes taken in the civil case I filed against him is Exhibit E. I asked him pertinent questions about this doctored memorandum but at the instruction of Mr. Alexander he refused to answer. My frustration was compounded when the trial judge in the civil suit stayed all proceedings pending the result of the criminal case.

#### IN THE LAW

IT IS MUCH EASIER TO PERPETUATE

AN ERROR

THAN TO CORRECT ONE



The court erred in failing to strike sua sponte prejudicial and wholly irrelevant documentary material filed by the Government in opposition to my motion for new trial. (CR 50 to 58)

Commencing on page 19 of the Clerk's Record is an affidavit of Richard D. Bennett, an attorney in Ocean Lake, Oregon, that on behalf of Empire Finance Corporation he turned over to me a check for \$2500.00 from Cimarron Insurance Co. for application on the mortgage against a theatre and that I made no claim to any portion of it for fees.

On page 22 of the Clerk's Record is an affidavit of Winnifred Jones, who together with her husband, owns a bakery in Ocean Lake, Oregon. She stated that she was president of Empire Finance Corporation and that this \$2500.00 insurance check was delivered to me in trust and that I did not claim any portion of it as a fee.

On page 23 of the Clerk's Record is an affidavit by O. G. Larson an attorney with 45 years practice, who represented Henry and Helen Johnson, mortgagees of the theatre, the damage to which was the consideration for the Cimarron Insurance Co. check for \$2500.00; that he had the check endorsed by the Johnsons to me and that it was not a fee and that it, together with \$4500.00 from an additionally \$5000.00 that was held by me for the Slaney family were invested in the Swan Drive In Theatre for the benefit of the Slaney family; that he had personal knowledge of the facts as he participated in the organization of the corporation and the redemption by the corporation of the Swan Drive in Theatre for \$15,000.00.

The \$2500.00 and \$5000.00 trust moneys for the Slaney family were deposited in my bank account. (Ex S-1, 5/1/58, 6/24/58)

Albert Deschenes testified that he presumed that the \$2500 deposit was a fee and investigated no further. He did not include the \$2500.00 or the \$5000.00 as a liability in the net worth statement and the court accepted his version. He also showed the \$7000.00 investment of \$7000.00 in the Swan Drive In Theatre as an asset (CR 1116, line 19, 19539) mine and not of the Slaneys. (Vol. 49A, 7/17/63, 1183-5, 19539)

Now, what was the answer by the prosecution to these affidavits? Nothing from pages 42 through 49 but pages 50 through 58 are a certified record of a recent conviction of Charles Slaney in Seattle, Washington on a felony charge.

The new evidence was conclusive on the two items of \$2500.00 and \$5000.00 to add to my liabilities for 1958 and almost wipe out 1958 deficiency. Yet the court denied my motion. It may, therefore be presumed that the court, instead of sua sponte striking the conviction record, used that as the basis for denial of my motion.

This was basic error. I could find no authorities and can not conceive of any principle under which a subsequent unrelated conviction of a person for whom a transaction was had by a lawyer could possibly affect the nature of that transaction. Certain conviction of Mr. Slaney could not impeach the credibility of Richard Bennett, a lawyer in Ocean Lake, Oregon, or Winnifred a business woman of the same community or O. G. Larson, a lawyer of 45 years experience. I submit that the court erred in not striking sua sponte the eight pages commencing with page 50 and crediting me with a reduction of \$7500.00 in my 1958 net worth.

Deschenes re my bank accounts and Cimarron \$2500 check

Q (page 1182 line 22) And so far as you know, all the bank accounts that he had during this period of time have been referred to and have been taken into consideration in the preparation of Exhibit 820 first amended, have they not?

A Yes.

Deschenes re Cimarron Ins. Co. \$2500.

Q (page 1183 line 2) I have another deposit slip here, or memorandum going with a deposit slip. This relates to the deposit of June 24, 1958 and it shows a deposit with respect to which the source is Cimarron Insurance Company, Inc. It shows the source or it is a check to Empire Finance Corporation and Henry Johnson and Helen Johnson in full settlement of loss under wind policy in the amount of \$2,500. Did you do anything with respect to that item? (from Exhibit S-1)

A May I have the date of that again? (line 14)

MR. BURDELL: The date is June 24, 1958.

Q (page 1185 line 5) The figure I have referred to is the figure of \$2500 under the heading "Cimarron Insurance Company, Inc., to Empire Finance Corporation and Henry and Helen Johnson, in full settlement of loss by wind policy, \$2,500." This was a deposit in Mr. Lenske's bank account, and I am asking you if you took it in consideration in the preparation of Exhibit 820 or 820 first amended.

THE COURT: ...Are you directing your inquiry to investigations, or as to whether the \$2500 was taken into

consideration in the summary sheets?

Mr. BURDELL: I asked him if he took it into consideration in the preparation of Exhibit 820 or 820 first amendment. The question goes both to the investigation and also to the dollars and cents, your Honor.

THE WITNESS: No, I didn't find any expenditure against it and I just left it there.

Q And by leaving it in, without making any investigation as to whether or not it was withdrawn for a business purpose or for some other nontaxable purpose, the result was that you charged him with taxable income to the degree of that \$2500; isn't that correct?

A Thought of it as a fee.

Q You thought of it as a fee when it is marked "In full settlement of loss by wind policy"?

A That is true. But it never was paid out.

#### DESCHENES FAILED TO INVESTIGATE

Q (page 1187 line 7) Did you check with either the Cimarron Insurance Company or the Empire Finance Corporation or Henry Johnson or Helen Johnson to determine whether or not this was a fee?

A Well, I don't recall right now whether I did or not.



The court erred in its assumption of material facts in the record when the opposite was true.

a. The court's assumption that no previous checks had been issued by me to Mary Nevens relating to her properties. See Ex J-1, 19539, admitted in part, withdrawn and reoffered.

b. That the unused gift certificates signed by her would have stripped her of practically all her property.

For the Court to be so wrong in its assumption of facts on two such matters that affected the court so much explains, at least in part, how the Court could be so wrong in its other conclusions.

The only reason the court said (Tr 56) that the \$500 check I gave her that morning was the only check she had received from me from the properties was because the Court believed it was the only such check and the reason it believed it was because it wanted to so believe. It was error for the Court to refuse to admit J-1 (Vol. 57, 4/21/64, pages 2,667-9 and 2,701-3, 19539) since it placed unwarranted significance to it not justified by the obvious facts. There were thousands of dollars of checks issued by me to Mary Nevens from the properties and this was but one of them.

The two unused gift certificates (Brier of Appellee, Appendix 1a and 3a, following page 88) totalled \$48,000 to members of my family and the total consideration for the sale of the Doan property was \$100,000. (Vol. 18, 3/18/63, 176, 19539) The total is roughly half as I said (Tr 57) instead of "practically all" (Tr 57) as Judge Carter said.

THE COURT: This is the woman who had all this (Tr 56) property in her name, and you probated her husband's estate and transferred it to her name. The only money she had received from this property, which was reportedly to be hers and her husband's, was the \$500 you gave her just before she testified. Isn't this the same case I am thinking of?

THE COURT: (Tr 57 line 11) Was that the only money she ever got?

MR. LENSKE: No...

Exhibit J-1 is a photostatic copy of numerous checks which I had issued to Mary Nevens from her properties. This illustrates how blinded the court was to the material evidenciary facts in the case because of his emotional outlook towards me. Again let us look at the record:

THE COURT: (Tr 57 line 23) This is the same woman who, although had the property in her name, had gift certificates to you and your family on practically all the property she ha

MR LENSKE: That again isn't true.

THE COURT: If those gift certificates had gone through, what assets would she have had?

Mr. Lenske: ...in round figures, she would have had half and my family would have had half.



## Specification of Error 11

The court erred in denying my motion for new trial and in ignoring the numerous uncontradicted affidavits of disinterested responsible persons and supporting documents showing:

a. Mandatory reductions in my net worth on each of the counts sufficient to eliminate any deficiency.

### ( 1)- Eleanor Bertrand

#### Chronology

- April 18, 1957 - Check by Bertrands to Reuben Lenske for \$3911.12 (Ex Y-1)
- April 18, 1957 - Notation "Paid me April 18, 1957" on statement found by William Marx in my file. (CR 871, 19539) (Vol. 57 pages 2669 to 2700, 4/21/64, 19539)
- July 1, 1957 - Payment of \$1500 by Bertrands to Reuben Lenske (Vol. 15, 3/15/63, page 114, line 3, 19539) (Y-1)
- Dec. 4, 1958 - Mortgage by Eleanor Bertrand to Reuben Lenske for \$2500. (Ex 2273)
- September, 1959 - Judgment, Albers Milling Co. v. Eleanor Bertrand, for \$11,000 on 1951 obligation. (CR 110)
- Nov. 5, 1959 - Eleanor Bertrand Bankruptcy petition filed (CR 105) Lists under Creditors Holding Securities - Reuben G. Lenske, 3d mortgage for services contracted in 1958 for - \$2500. (CR 109) No listing of any indebtedness to Reuben G. Lenske under unsecured creditors. (CR 110)
- Nov. 27, 1959 - Referee's memo says bankrupt said mortgage to Reuben Lenske was given for legal services and loans made largely to bankrupt's husband (CR 122)
- April 9, 1961 - Letter by Eleanor Bertrand to Albert Deschenes that loans were repaid and mortgage was for future services and that "Mr. Lenske has helped me immeasurably. (Ex G-3 and CR 9)
- Nov. 16, 1962 - Affidavit written by Glen Tellgren, Albert Deschenes' emissary and signed by Eleanor Bertrand (Ex I-3) See gist two pages forward.

March 15, 1963 - Testimony of Eleanor Bertrand (Vol. 15,  
pages 112 to 127)

Substance of Testimony

BY MR. ALEXANDER:

Q (page 115 line 18) Have you made any payments on this mortgage?

A No, I have not.

Q Other than the \$1500 and the mortgage, have you repaid Mr. Lenske any of the moneys that you and your husband borrowed?

A Yes. I believe there were payments. My husband would borrow money for a time to make improvements on the place, and then he would pay back some. They were mostly handled by him and Mr. Lenske, and I really don't remember, nor do I have any records.

Q Did this mortgage on your home represent the total that was owed Mr. Lenske, do you know?

A Well, it also represented services that Mr. Lenske had rendered to us over a period of years, and he was still rendering to me.

Q (page 124) Other than the \$1500 from the fire, there has been no repayment of these moneys, has there?

A I don't know what repayment there was of moneys in '56, '57 and so forth. But after -- well, at the time I made up the mortgage, that was, you know, to take care of anything we owed him and for services.

BY MR. LENSKE - cross examination

Q (page 125) Do you recollect that the \$2500 mortgage was in anticipation of considerable legal work that would have to be done in the future?

A That was the understanding.

Q And was that the purpose of the \$2500 mortgage?

A Yes.

Q ...isn't it a fact that when you received the insurance money, there was sufficient money with which to pay me any balance for advances that I had made for you?

A ...I believe so...

Substance of Testimony of Eleanor Bertrand

on July 19, 1963 (Vol. 50)

BY MR. BURDELL:

Q (page 1489) And what occasioned you to write that letter (G-3, also CR 9)?

A I received a phone call from Mr. Deschenes, who said he was an Internal Revenue Agent, and he talked to me over the telephone and then he asked me to confirm what we had talked about by writing a letter to him, and I did that.

(Note - Mr. Deschenes did not rebut this)

Q And in your letter, which is Defendant's Exhibit G-3 (also CR 9), did you correctly state the facts?

A To the best of my knowledge, I correctly stated the facts in my letter, yes.

Q (page 1490) Now, the affidavit (Ex I-3) states:

"Then in December, 1958 I gave Mr. Lenske a mortgage for \$2500, which he stated was the approximate amount I owed him at that time. I still owe him this \$2500 plus the charges for

and later years."

Is the letter correct, or is the affidavit correct?

A The letter is absolutely correct.

Q Do you want to explain?

A I talked to -- I don't remember what his name was -- the young fellow that came to the house, and he wrote this out and I signed it. I didn't at the time realize that he had written "he stated was the approximate amount I owed him," because Mr. Lenske never did state I owed him any approximate amount.

BY MR. ALEXANDER: Cross Examination

A (page 1491)...according to his figures there was a difference of \$2500 and I assumed the Government's figures are right....But at the time I gave Mr. Lenske the mortgage it was to cover for the fees, because I was going through the time of a lot of indebtedness.

Q Did you read the bottom of it where it says:

"I fully understand this statement and it is true, accurate and complete to the best of my knowledge and belief"?

A Yes, sir. He showed me some figures and he said that there was \$2500 still owing on old figures from the statement he had. But Mr. Lenske never did say that I owed him \$2500, and to the best of my knowledge I thought everything was paid up.

A (page 1498) At the time I wrote this letter it was my understanding, but after talking to the Government agents



didn't know how much I owed him, and I have never talked  
to Mr. Lenske about how much I owe him, but at the time I  
gave him the mortgage what I said in this letter was true.

Q (page 1499) What was the check to represent, ma'am?

A Monies due him for previous loans and so forth.

Q And you have never considered part of the check  
services that you were paying Mr. Lenske for?

A I have no idea because my husband handled it before.  
I made out the check on my husband's orders.

Q Well, then, do you know what the check was for, ma'am?

A I know it was for loans Mr. Lenske made us.

Q (page 1500) Then my question is quite simple. Do  
you know what this check is for or don't you, ma'am?

A I am fairly certain it was for loans Mr. Lenske  
made us.

Q What did your husband tell you, as your testimony now?

A Well, after all, I know it was for covering things  
that Mr. Lenske had loaned us but I don't -- I don't remember  
exactly.

Q You don't remember, do you, Mrs. Bertrand?

A No.

MR. BURDELL: (page 1504)

Q Do you have the slightest concern about whether he  
will ask you or what he will do as a result?

A Mr. Lenske has always treated us very kindly. He has  
helped us out when we needed help...I have never had any reason  
not to trust him.

10  
Q (page 1505) Now, did you have a telephone call from Mr. Deschenes within the last three or four days?

A Yes, about two nights after -- oh, let's see, last Monday night, I believe it was.

Q What was that conversation?

A Well, he seemed quite upset over the fact that I found that check and he asked me -- he told me that I could get in trouble for making false statements. I have never at any time made any deliberate false statement.

(Note - Mr. Deschenes did not deny this)

Q Is that all the conversation you recall? Is that all he said -- that you could get in trouble?

A Well, I don't know; I just felt quite worried after the phone call -- concerned, because I hadn't meant to make any false statements.

Q Getting back to the letter you wrote to the Internal Revenue Service, which is Exhibit G-3 (also CR 9), this letter was written before anyone came out and gave you a lot of figures and a lot of conversation; isn't that right?

A Yes, it was.

Q And it is correct, is it not?

A Yes, to the best of my knowledge, this letter was correct.

THE COURT: And you wrote this letter, Exhibit G-3 yourself?

A Yes I did...(page 1508) I definitely wrote the letter myself and I didn't even call Mr. Lenske before I wrote it.



Eleanor Bertrand Chronology Continued.

- Feb. 12, 1965 - Affidavit of Eleanor Bertrand confirming:  
(CR 6)  
(Filed Feb. 15, 1965)
1. That the check for \$3,911.12 was for repayment of advances and not fees.
  2. That the statements in her letter of April 9, 1961 (G-3 and CR 9) are correct.
  3. That insofar as the statement of Nov. 16, 1962 (Ex 1-3) differs from the contents of the April 9, 1961 letter the Nov. 16, 1962 statement is incorrect.
  4. That the \$2500 mortgage was given for future services to help preserve her homestead and that all advances had been repaid.
  5. That she had located the original statement of advances on which the \$3,911.12 check of April 18, 1957 was issued and deposited with her attorney in Oregon City and a copy of which is CR 10.
  6. That she also found the original check stubs which included the stub for the \$3911.12 check and that she had written on the stub the word "loans" to describe what the check was for.
- Feb. 7, 1965 - Affidavit of Bruce W. Bertrand, son of  
(filed Feb. 15, 1965) Eleanor Bertrand (CR 10), that after last Christmas (Dec. 25, 1965) he saw his mother go through the old records in which she found the statement for \$3,911.12, CR 10 and the check stub for the check in the sum of \$3911.12.
- Feb. 5, 1965 - Affidavit of John C. Anicker Jr. (CR 11)
- Filed Feb. 15, 1965)
1. That he is one of the attorneys for Eleanor Bertrand.
  2. That in January, 1965 she brought to him the original statement for \$3911.12 of which CR 9 is a copy and the original may be checked in his office by either party.
- Feb. 29, 1965 Affidavit of Harry Thrall (CR 13) that he did masonry work for the Bertrands and that he received full credit for the \$828.59 appearing on statement on CR 8.
- Filed Feb. 15, 1965)

Feb. 12, 1965 - Affidavit of Harry Thrall that he is a  
brick and cement mason (CR 14) that L. J.  
Bertrand agreed that, upon purchasing  
the masonry equipment from bankruptcy  
estate he would resell to Thrall.

Filed Feb.  
15, 1965.

That he did purchase and did resell.

That Reuben Lenske advanced the money  
for Bertrand and that Thrall would repay  
the first \$1545 to Reuben Lenske.

That he did repay by work and money  
in 1957 and 1958.

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#### Summary

1. The \$3911.12 check from Bertrands to Reuben Lenske together with the \$1500.00 check repaid Reuben Lenske for all advances that he had made for them.
2. The December 4, 1958 mortgage from Eleanor Bertrand to Reuben Lenske for \$2500 was given as security for future legal services and to assist Eleanor Bertrand to retain her homestead - and it did.
3. The Bertrands owed nothing to Reuben Lenske on December 31, 1957 or on December 31, 1958 for net worth purposes.
5. The item 213A on line 34 of page 1116, CR, 19539 should eliminate \$5472.15 for 1957 and 1958. Since this sum exceeds the deficiency found of \$4990.41 (CR 1072, 19539), Count II should be dismissed.
6. In view of affidavit of Harry Thrall (CR 14) and failure of prosecution to follow up lead Reuben Lenske's net worth should be reduced by \$1545.00 for 1957 and/or 1958, he to be given the benefit of the doubt as to year.
7. The general effect on Deschenes' testimony will be considered later together with Tarlow and other items.

## Judging a Judge

The Bertrand testimony is extremely important in evaluating Judge Carter's evaluation of Mrs. Bertrand and myself on the one hand and Mr. Deschenes on the other. Perhaps it explains how Judge Carter is so wrong in the rest of the case.

Judge Carter has profound respect for the ability and integrity of Mr. Marx, a CPA who had been the head of a fraud squad for the Internal Revenue Service for the Pacific Northwest States (Vol. 57, 4/21/64, 2,698, 2,699, 19539):

THE COURT: ...He (Marx) is a fine tax man. I will pay him that compliment.

THE COURT: You (to Marx) are an expert in the field of tax matters, and I'll pay you a high compliment -- any time you need a recommendation as a man who has been thorough and diligent, have them talk to me or write to me.

Mr. Marx, as per his affidavit (CR 968, 19539) and his testimony in open court, Vol. 57, 4/21/64, 2,680 to 2,689, 19539, found an L. J. Bertrand (Eleanor Bertrand's husband who died in 1959) file that he had not come across before. In it he found the statement (CR 970, 19539), which details the advances made by me to the Bertrands and says in my handwriting "Paid me April 18 1957". There are several other items in my handwriting in ink.

To an open minded judge this evidence along with the cancelled check of April 18, 1957 to me from the Bertrands and my testimony and Mrs. Bertrand's testimony would be

conclusive beyond a reasonable doubt that I was paid \$3911.12 on April 18, 1957 for previous advances.

But here is what Judge Carter said:

Vol. 57, 4/21/64, page 2672:

THE COURT: ...I have serious doubts as to the material he (Marx) found in the files; not doubts as to Mr. Marx, but doubts as to how there appeared in the file a sheet with computations that finally add up, with certain subtractions, to the \$3,911.12...and I have serious doubt as to the authenticity of the summary shown therein.

And on page 2671

THE COURT: I don't question Mr. Marx's integrity and I believe this affidavit where he says, "I searched various files and found a file entitled 'Lee J. Bertrana.'" I do seriously question how it happened that this file that is discovered by Mr. Marx long after the trial. I am not questioning Mr. Marx. I know that he found the file entitled "Lee J. Bertrana." I have serious doubt as to whether or not the defendant didn't make it possible for the file to be somewhere where Mr. Marx was looking.

Judge Carter is so blinded with unwarranted prejudice against me that he concludes that I planted a file for Mr. Marx to find and that Mr. Marx, who is intelligent and has integrity and diligence, fell for the plant. But that is quite insignificant unless, as the judge says: "and I have serious doubt as to the authenticity of the summary shown therein."



In other words I must have made up a fake statement that fooled Mr. Marx but didn't fool the court. Here is where the court shows its misjudging me and its unwillingness to examine the evidence, piece by piece, on each item before coming to a conclusion on that item.

To really plant a file to fool a man with the ability of Mr. Marx would be a petty and useless act, which in itself would have no significance and would necessarily lead to the resignation of the accountant. I pride myself with at least sixth grade brains sufficient to avoid such an act.

But the statement itself, the summary, as the judge called it, is another matter. In announcing his findings from the bench Judge Carter had said two months earlier, Vol. 57, 2/28/64, page 2538)

"Now there is under submission to the Court the matter, the Bertrand matter, No. 4, involving the \$3,900 check. There is no way this check pays off an account. You can try the figures any way you want. The defendant claims that it was payment on account. The Court finds it was payment of an attorney's fee and not on a running account."

It was important, if there was to be any change of mind on the part of the trial judge, to show him more than the substance of having "\$3,900" coming for advances and its application accordingly. It was important to satisfy the

judge's mind that there were items that added up to \$3911.12. And that is what Mr. Marx set out to do.

But, as important as it was to find where that \$3911.12 came from exactly, only a person lacking in brains as well as integrity would fake such a statement. That statement has three items in handwriting in ink and it is obviously my handwriting. There is a considerable amount of typing on the statement, or summary, as the judge calls it. My opponent is the United States of America, the richest and most powerful nation in the world with experts following its heels (ask Elmer Kolberg). Money has been no object in the Government's pursuit of me. The Court made its finding on Feb. 28, 1964 and we are between the date of that finding and April 15, 1964 when Mr. Marx found the L. J. Bertrand file. We are then seven years, lacking a few days, from April 18, 1957.

Who, with no integrity, but with a modicum of brains would fake a statement purporting to have been typed and written seven years earlier?

And here I come back to judge the Judge. If he were not so blinded against me he would <sup>have</sup> looked for the evidence; he would have instructed the prosecutor to have the summary analyzed for its current vintage or 1957 vintage as to both the typing and the writing. He could have then judged me



on evidence, not on conjecture, suspicion and prejudice.

But the manufacturing was at the other end, not on my end. I did not charge the Bertrands a fee of \$3911.12, the Bertrands did not agree to pay me a fee of \$3911.12 but Judge Carter created a fee of \$3911.12 for us.

That phase passed, however, and then we came to the current phase. Almost a year later Eleanor Bertrand found the original statement of which mine was a copy. She also found her check stub with her own handwriting showing that the check was for the payment of loans.

This original statement and the handwriting on the stub were made available to the Government for analysis. I say that no unprejudiced judge would refuse the challenge to ascertain the truth or falsity of that statement and that check stub. And none but an honest person like Mrs. Bertrand would submit them on her own responsibility under oath through her attorney for such analysis. And it must be remembered that Mr. Deschenes had already threatened her about making false statements and that she was already afraid of him, not of me.

Therefore the Bertrand item is more important than wiping out Count II. It shows that the trial judge misjudged me as to both intelligence and integrity, that he misjudged Albert Deschenes, who engineered a false statement from Mrs. Bertrand. It shows that the trial judge was not of a frame of mind open enough to judge me fairly on the other issues in the case.

a. Mandatory Reductions

(2) Cecil and Margaret Doan

The affidavit of Margaret Doan appears on page 15, CR and the extended affidavits appear on pages 16, 17 and 18. Margaret Doan's supplemental affidavit appears on page 83, CR and the pertinent page of the Doan tax return for 1958 appears on page 84, CR.

The substance of the affidavits is simple. The Doans sold their home to the Lloya Corporation for \$100,000. They had previously transferred a three tenth interest in the property to my law partnership, Lenske Lenske, Spiegel and Spiegel. I received the downpayment of \$28,500 on December 31, 1958. Seven tenths of it belonged to the Doans, \$19,950 and the remaining three tenths, \$8,550, belonged to my law partnership. The Doans reported the sale on their tax return for 1958 at \$70,000 and showed \$19,950 received in 1958.

The court's finding, CR 1116, 19539, shows, line 32, F 213, an account receivable to me 1954 to 1957 but there is no showing of an account payable to them by me on December 31, 1958 to reflect my indebtedness to them for \$19,950, which is reflected in my bank deposits for that day. The \$8,550 should show as a liability by me to the partnership. Any credits for disbursement by me to the partnership on December 31, 1958 should reduce that \$8,550 liability accordingly.

This is the only appropriate and logical method of showing true net worth. Adjusting book entries made subsequently for convenience should in no way change or affect my true net worth at the end of the day on December 31, 1958.

Since the amount necessary to wipe out 1958 deficiency is less than \$10,000, this item, without having to resort to any of the other items in issue, should wipe out 1958 deficiency and result in dismissal of Count III.

There are major disadvantages to a taxpayer in the use of the net worth method to ascertain his income. The method should not be shifted in specific instances to the further disadvantage of the taxpayer.

In the following pages is the essential testimony of Margaret Doan given at the trial showing the exhibit references.

The court should not permit itself to be confused by consideration of a transaction that might have taken place but didn't. In most criminal cases the defendant urges before a jury complications and ramifications that will becloud simple facts. I regret to have to state that in this case the prosecution is seeking and thus far has successfully sought to becloud and befog the simple facts from a net worth standpoint.

Margaret Doan's Testimony

Vol. 18, 3/18/63, page 161, 19539

By Mr. Alexander

Q Now, Mrs. Doan, are you familiar with the property at 828 N.E. Multnomah Street?

A Yes.

Q Did you at one time own that property?

A Yes, that was our home.

Q Is that the property that you ended up selling to Lloyd Corporation out here for a shopping center?

A Yes, sir.

page 164

Q ...did there come a time in 1955 when you and Mr. Lenske and Mr. Spiegel made an agreement with respect to the proceeds or with respect to the legal fees concerning this property?

A Yes.

page 165

Q That was signed about February 15th, 1955?

A Yes.

Q This was the agreement that provided for the legal fees in connection with this property: is that right?

A Yes.

MR. ALEXANDER: The Government moves the admission... being an agreement of February 15th, 1955, executed by the Doans, Lenske and Spiegel...Exhibit 2302. (Received)  
BY MR. ALEXANDER:

Q In this 1955 agreement that you made, Mrs. Doan,

proceeds when the property was sold; is that right?

A Yes.

Page 172

Q Then you did sell the property; is that right?

A Yes.

Q That was sold to Lloyd Center?

A Lloyd Corporation.

Page 173

Q What was the occasion for your asking that the deed be placed in Mary Nevens' name?

A We were going to trade our property there in Holladay addition for some property, and we thought it would be a good investment.

Q. Then we decided that we wanted the cash instead of the trade.

Page 174

Q Now, the trade didn't go through, did it?

A No.

Q But the deed to the property that was sold to Lloyd Corporation was made out to Mary Nevens?

A Yes.

MR. ALEXANDER: The Government moves the admission of Government's Exhibit...No. 727, a deed from the Doans to Mary Nevens dated December 31, 1958 ...and also moves the admission of Exhibit 728, a deed from Mary Nevens to the Lloyd Corporation dated December 31, 1958. (Received)



Page 175

Q Now, when the sale was made to Lloyd were the negotiations handled by the defendant?

A Yes.

Q And you approved the final purchase price?

A Yes.

Q When would that have been, Mrs. Doan?

A Well, it was sometime the latter part of...  
'58, or the first of January, '59.

page 176

A And they started out with an offer of \$14,000 first.

A ...the Lloyd Corporation...told us at one time that \$30,000 was as high as they would go; that we could take it or leave it; that they wouldn't go any higher.

Q But finally they agreed to pay you \$100,000; isn't that right?

A Yes.

Cross-Examination by Mr. Lenske page 179

Q And then was it with your knowledge and consent that it was to be done that way?

A. Yes.

Q And it was arranged that the money was to be paid to me and that I should divide the money between yourself and my firm as attorneys?

A Yes

Q And was that done in accordance with our understanding and what was desired by you?

A Yes.



## Specification of Error 11

### a. Mandatory Reductions

#### (3) Depreciation - Elmer Kolberg, Gov't Appraiser

On pages 25-27 are my affidavit and excerpts of the testimony of Elmer Kolberg in a criminal case in this District that was tried subsequent to mine. Elmer Kolberg was the successful Government appraiser in that case as well as in mine.

The substance of Kolberg's testimony in that case is that "the bulk of my (his) work is for governmental bodies" and that he always testifies to lower values on behalf of the Government than property owners and their appraisers in condemnation cases.

In my offer of proof required of me by the Court I said (Tr 78):

"I want to further show that the bulk of his income with slight and rare exceptions, is from testifying for Governmental bodies; by testifying and appraising values at less than what the property owners in numerous condemnation cases, or their respective witnesses testifies as to what the values are."

The court erred in requiring me to make an offer of proof of what a biased Government witness would say instead of letting me examine that witness on the stand.

Since the court accepted Kolberg's testimony as gospel (CR 1054, 19539) and since the impression given by Kolberg in my case (Brief of Appellee page 10) and found by the court (CR 1054, Tr. 249-53, 19539) was that Kolberg did

general appraising as well as Government appraising and since appraisal as accepted by the Court was a sine qua non for finding deficiencies against me for all four years, it was extremely important that the newly discovered evidence that I hoped to show from his testimony, that Kolberg was not really an independent appraiser but a Government appraiser with a cloak of independence, be introduced.

I have already shown in my brief in 19539 that:

1. Kolberg admitted that he did not inspect the interior of all the properties he appraised (page 4).
2. Kolberg gave no consideration to what occurred to the properties between date of acquisition and date of inspection, which sometimes was fifteen years (page 5).
3. Kolberg failed to consider the income or loss factor in determining economic life.
4. Kolberg used cash values for properties on contract (page 10)
5. Kolberg gave/<sup>future</sup>economic life to buildings that had already been removed and replaced by new buildings. (page 10)
6. Kolberg did violence to fair and competent appraising. (pages 7 to 20)

I should have been allowed to administer the coup de grace to his testimony by showing that he misrepresented his true status when he testified against me. His testimony in the subsequent case (CR 26, 27) was a clue. I should not have been required to delineate to the court what he would say when \$10 more per month per property in depreciation would have wiped out all deficiencies.

Specification of Error 11

a. (3 $\frac{1}{2}$ ) See " 9

a., (4) Pierce properties, checks show it was

not uncommon for me to issue checks for income taxes for other people, affects 1958 and intent.

The court held against me on both ownership and intent related to taxes in my relationship to Mr. Pierce with respect to whom I prided myself as having dealt as one human being should towards another when he is in less fortunate circumstances. Ultimately, as in most instances does not happen, in this instance it turned out to be for my benefit.

The court based its holding against me on this item and, because of it, perhaps on all others, because I had paid Mr. Pierce's income tax for the year involved.

Like in the Bertrand matter it was appropos to look for evidence that meet the expressed wrong interpretation given by the Court. This I did by finding other income tax payment checks for Mr. Pierce and for others. I produced some of such checks in support of my motion for new trial.

However, to understand this matter it is urged that the court read pages 696 to 699 of the Clerk's Record, 19539.

## a. Mandatory Reductions

## (5) A. L. Prater

Mr. Prater's affidavit and supporting exhibits appear on pages 34 to 38 of the Clerk's Record. There is no counter affidavit. It shows truck and business use automobiles repair work done by Prater for me during the years in issue. The total comes to \$1932.69. My net worth should be decreased accordingly, especially \$1208.56 charged to me in CR 1117, F 139C, line 11, 19539. This was a payment of taxes on property in Lincoln County. If, as apparently was done, the Government treated my payment of those taxes a payment for the Praters, that should have constituted an offset against or a payment on the trucking repair services rendered and charged to me by Prater. This \$1932.69 reduction is more than 10% of the total deficiency found against me for the four years and is therefore substantial but it is more important for another reason.

Albert Deschenes investigated this matter and was shown the copies of the ledgers with these charges. And these were also shown to the prosecutor. This evidences deliberate disregard of a substantial item for which the prosecution had a lead and the disregard of the item because it was favorable to me. Adding this to the other wrongdoing by Deschenes, his net worth statement should be stricken.

whose testimony in a civil case was introduced in evidence by the Government and who were present in the courtroom at the time I was presenting argument and evidence in support of my motion for new trial. (George Nyman, Albert Deschenes, and John Brady, who was subpoenaed and refused to come)

9. The court erred in failing to strike sua sponte prejudicial and wholly irrelevant documentary material filed by the Government in opposition to my motion for new trial (CR 50 to 58).

10. The Court erred in its assumption of what it considered material facts in the record when the opposite was true from a factual standpoint.

- a. The Court's assumption that no previous checks had been issued by me to Mary Nevens relating to her properties.
- b. That the unused Mary Nevens gift certificates would have absorbed practically all of her properties.

11. The court erred in denying my motion for a new trial and in ignoring the uncontradicted affidavits of disinterested persons showing

- a. Reductions in my net worth on each of the counts sufficient to eliminate any deficiency.
- b. The utter unreliability of the two agents whose testimony was the sine qua non of the indictment, the net worth statement, and the judgment.



a. Mandatory Reductions

(6) Aremel Depreciation

On pages 39 to 41 of the Clerk's Record are my affidavit and the affidavit of David Raffety. They relate to a commercial fishing boat that was put in a corporation by that name but which was operated by Raffety and myself as a partnership and on which partnership returns were filed through the year 1954.

They show that at the end of 1954 Raffety relinquished his interest in the boat to me and that commencing with the year 1955 I was the sole owner. The boat deteriorated rapidly after that and was a total loss in 1959. I made two errors. I neglected to claim depreciation on my increased cost of \$3000 and therefore understated my depreciation. I made the further error of claiming depreciation both on my personal return and on the Aremel corporation return. (Folders 4A and 4K) The corporate depreciation was meaningless as it had no income and I operated the boat as an individual.

I should be given the benefit of any doubts and allowed depreciation of \$1460.00 for each of the years in issue. This item is again important because my investment in it shows up in Exhibit 190, the Cauthorn net worth statement which Deschenes used as an anchor whenever he chose. He completely ignored this beginning net worth asset and, added to other intentional omissions, should vitiate his testimony and Government net worth statements.



## Specification of Error 11

### a. Mandatory Reductions

#### (7) L. W. Taylor \$2000 Mortgage

On CR page 58(a) to 58(f) and 58(k to n) appear affidavits and supporting documents. The court found (CR 1117, 19539) that a mortgage from L. W. Taylor to Kriss for \$2000 was (F 182 Ex 609) an asset of mine. There was no evidence in the record to support that conclusion.

However, I discovered in 1958 that this mortgage was worthless.

I arranged for a \$2000 loan to L. W. Taylor to be secured by a mortgage on real property. The title report shown me dated December 2, 1957, showed Lot 2 Block 89, Irvington, Portland, Oregon, free and clear in Josephine F. Goodale, except about \$300 in taxes.

On the following day, December 3, 1957, the mortgage was executed by Taylor to Kriss along with a deed from Goodale to Taylor and the \$2000 was paid to Taylor. However, Taylor had substantial Federal tax liens against him that attached to the property immediately upon recording of the deed from Goodale to Taylor. See title report of January 14, 1958, (CR 58 M & N). The property was foreclosed for County taxes. This worthless asset should be removed from my net worth for 1958 to the extent of \$2000.

## Specification of Error 11

### a. Mandatory Reductions

#### (8) Rebecca Tarlow

On pages 58g to 58j is my affidavit re Rebecca Tarlow and on page 58-o are a cancelled check for \$3000 and one dated July 13, 1956 for \$5000, both from Rebecca Tarlow to me. On page 58P of the Clerk's Record is the first page of Rebecca Tarlow's affidavit signed at the request of and prepared by Albert Deschenes. It is marked Ex W 2358 under file No. 19539.

The prosecution's answer to the Rebecca Tarlow item appears on page 97 through 103 of the Clerk's Record and includes an answer on page 98 to the L. W. Taylor item. The Rebecca Tarlow item is important for two reasons. It shows unmistakable overstatement of my net worth for the year 1956 by \$5000 and wrong figures for each of the other years in issue. The check I received and the deposit in my account (S-1, 19539) and the mortgage given as security are not denied by the prosecution. Both the Court and the prosecution frustrated previous attempts on my part to get that part of the record straight. However, Rebecca Tarlow sued me in the State Court for \$31,500 and I took her deposition as an adverse witness and, reluctant as she was to give out with it, enough truth came out to grant me a new trial or dismiss all counts.

Mrs. Tarlow testified at the trial (3/21/63, Vol. 20, pp. 131-141) but that the affidavit signed by her at the request of Albert Deschenes was correct. See CR 98, Government's Opposition to New Trial, in which it quotes her from page 141 of the transcript:

A. Yes, that is correct, because we went through those very thoroughly at the time."

Mrs. Tarlow presumed that the statement prepared by Mr. Deschenes was correct and I presumed that both she and Mr. Deschenes were correct (Tr44, 45, 46). So the starting point is that, as per Mrs. Tarlow's testimony in the deposition, (CR 58-H):

1. She turned over all her records to Mr. Deschenes.
2. Deschenes came to see her at the hospital (CR 58-I).
3. He told her the affidavit was prepared from her material.
4. The memoranda had been furnished to him.
5. The affidavit prepared by him and signed by Mrs. Tarlow vary substantially from the records themselves.
6. The variance is between \$28,500 and \$39,000 or \$10,500 and the most glaring example of the variance shows up in the \$5000 check of July 13, 1956.

Conclusion  
from new Tarlow evidence

If I am right about this glaring misstatement by Deschenes as evidenced by this new evidence from Mrs. Tarlow then the case should be dismissed. If I am wrong about it I challenge the prosecution to say so, not to

say that Mrs. Tarlow once testified the other way, not to say that I should not have relied upon Mrs. Tarlow and Mrs. Deschenes to tell the truth, not to say that I should not have been so ignorant, but to say in its answering brief that the statement prepared by Mr. Deschenes from Mrs. Tarlow's records is correct. If the prosecution believes it is not correct I challenge it to prepare and show in its brief a correct statement <sup>of</sup> ending balances each year on Mrs. Tarlow's account. I demand a specific answer to my challenge that the ending balances each year as prepared by Albert Deschenes is false and substantially incorrect.

And if I am correct in my last demand I demand a reversal for the use of known and substantial false and manufactured evidence against me by the Internal Revenue Service and the prosecution.

It must be remembered that Mr. Deschenes was not an isolated agent who made an error as any human being is subject to. He masterminded my prosecution. He did the investigation. He failed to follow leads or concealed the result in numerous instances that would be favorable to me. He stole my records and kept many of them, TILL he was caught with them. AND HE WAS THE EXPERT WHO PREPARED EX 820 UPON WHICH THE COURT FUNDAMENTALLY BASED ITS FINDINGS AGAINST ME.

Specification of Error 11

a. (9)

W. K. Royal testimony, affected title to F 43 and my credibility and showed Government produced two perjurious witnesses on that one item.

One property in issue is described in Folaer

43. The only evidence of ownership of that property besides Mr. Royal's by me/was the testimony of Madelyn Cox: (2/25/63, Vol. 4, page 55, 19539)

MR. ALEXANDER TO MADELYN COX:

Q Well, when you borrowed the \$500, did you continue to make the payments on the contract after that?

A No, because he told me it was his house then; that I signed the house over to him.

The falsity of this testimony was apparent when one reads her own handwriting and my letters in response as they appear in pages 201 to 215 of the Clerk's Record, 19539.

Mr. Royal also testified that I told him the property was mine (Vol. 6, 2/22/63, 203, 19539). This testimony was proved false when Mr. Royal testified in the State Court that I had never told him that I was the owner. (CR 33)

Thus we have an example of curiously related false statements of my ownership by two persons with interests adverse to each other. The testimony was of oral statements claimed to have been made by me nine or ten years previously.



I shall be more specific. Mr. Royal testified in this case on February 22, 1963 (CR 33, line 31):

"...and at that time he told me that the property, - the contract had been assigned to him."

On July 29, 1963 Mr. Royal testified in the State Court (CR 33 line 25):

"You never told me of any assignment to you."

Yet the property was attributed to me in the Deschenes and the subsequent net worth statements and in the Court's findings (CR 1110, 19539).

I cannot believe that the two false statements of oral admissions by me that many years (nine or ten) previously were not inspired by a person or persons on the prosecution side. Relating this instance to the threat made to Mrs. Bertram by Mr. Deschenes, the false affidavit prepared for her, the false affidavit prepared for Mrs. Tarlow, and a similar type false statement by Mrs. John T. Garson (Vol. 4, 2/25/63, page 188, line 4, 19539): "The letter said, stated that he had purchased the property (Pierce property)..." and there is a pattern shown which should result in the dismissal of the case against me. The falsity of the Garson testimony is evident when one examines the letter itself, which I later found and made a part of the record. See CR pages 193 to 199, 19539.



## Specification of Error 11

a. (10) The court's newly expressed finding should allow me an additional \$1500 reduction in my net worth.

This refers to the "Meyer Gold Mine", references to which are page 56 of appellant's opening brief, CR 461, 1030 and 1036 of 19539, Ex N-1, Ex X-2, Adj. 15

The court made a finding (CR 1036, 19539) that I had invested \$3000 with John Meyer for purchase of a gold mine in Southern Oregon; that title was taken in John Meyer and "that the defendant's investment became worthless when Meyer disappeared in 1956 and had previously conveyed away the property and the defendant had a \$3000 long term capital loss in that year." This reduced my net worth by \$1500 for 1956.

It was my position that the court resolved the year of the loss against me, i.e., I claim that I should be allowed to take the loss during the year of discovery of the theft by fraud and that since there is uncertainty as to whether that is 1955, 1956, 1957 or 1958, I should be given the benefit of any doubt and take it in such year as it would do the most good in this case. That question still remains to be determined by the appellate court.

However, the court's finding failed to recognize the loss as a theft loss through fraud (John Meyer having conveyed the property without my knowledge to a third

party. On August 15, 1965 (Tr 26) the Court either changed its finding or expressed its true finding when it said:

THE COURT: I went along with some of your theories; the mysterious miner you were in partnership with; you bought a gold mine and he sold you down the river without telling you, and you forgot all about your gold mine for a number of years, and then you came along and finally discovered you had been defrauded, and you filed an allowance on your records for that. I allowed the allowance on that, although it was kind of a mysterious story...

THE COURT: I am just telling you I accepted some of these stories, as fantastic as they were, because in that case you had some proof you had paid some money. The Title Company had a certificate there. But how a practicing lawyer could buy a gold mine and forget about it for a number of years, and finally his partner defrauds him out of it by selling it; I went along with it.

In the present state of the record I should be allowed a total reduction of \$3000, which would mean an additional reduction of \$1500 for 1956 (which would automatically wipe out Count IV since the difference between my reported loss for that year and the amount of loss found by the court, \$9940.45 as against \$9231.59, left a difference of or \$708.86); or I should be given the choice of the year between 1955 and 1958 to take the complete \$3000 loss. Of course, if I chose other than 1956 that year's net worth would be increased by \$1500.

This also points to the valuelessness of the court swallowing whole the findings of the prosecution instead of making its own findings so that the appellate court can really perceive the trial court's thinking.

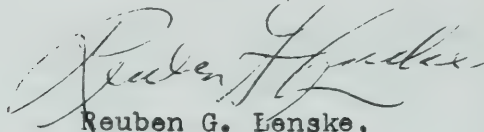
## Honesty in Government

I have no quarrel with the Government requiring honesty from its taxpayers. I do quarrel with my Government when it is not honest with its taxpayers.

I do not believe that any disinterested person would sanction the conduct of Deschenes and Nyman in stealing my records from my files. I do not believe that any disinterested person would sanction their making affidavits that they had no records of mine while they held microfilm of two hundred fifty documents that they knew John Brady had stolen from.

I do not believe that the best leaders of a democracy would sanction the silence of Deschenes and Nyman in their memoranda, in their log books and in their reports to their superiors about their stealing and photostating documents from my files. Judging from (in the appendix) the attached article/ in the Saturday Evening Post by Senator Long of Missouri this practice had the approval of the superiors under the admonition, "When you're caught, you're on your own." I attach it to show that the problem is not an isolated one with me alone. It is widespread and one effective method of requiring integrity ~~in~~ in the Internal Revenue Service along Constitutional lines is for the Courts to say so and to rule that such practices as were indulged in in my case will not be rewarded with favorable judgment.

Respectfully submitted,

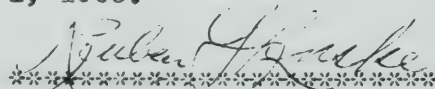


Reuben G. Lenske,  
Appellant.  
1014 S.W. 2d Ave.,  
Portland, Oregon  
97204

Certificate

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated December 1, 1965.

  
\*\*\*\*\*  
Attorney pro se.

My returns were prepared openly and honestly by competent and reliable persons. My former secretary, Mary Yumibe, who later went to work for the Government, said in her affidavit (CR 944, 19539):

"That I helped prepare or type the income tax returns for the partnership and for the individual lawyers in the office; that Reuben Lenske's return was usually prepared the night before the due date, and I helped work that evening with other persons who likewise helped prepare his returns. That to the best of my knowledge, the returns were prepared openly and honestly."

Elva Hawkins was the first witness called by the Government. She maintained the records for the rental properties her husband managed for me from the year 1953 to the year 1961. She helped prepare most of my tax returns for the years in issue (Volume 1, 2/15/63 44, 74-77, 19539.)

Volume 1, 2/15/63, page 43, 19539

Q. (by Alexander) What is your occupation, Mrs. Hawkins?

A. I am an office manager.

Q. Where do you work?

A. Building Products Company.

Volume 1, 2/15/63, page 104, 19539

Q. (Mr. Lenske) What is your education?

A. Well, I finished high school, and have a college degree.

Q. Which college degree?

A. Bachelor of Arts degree from Warner-Pacific College.

Q. In what?



A. Christian Education.

Volume 1, 2/15/63, page 94, 19539, lines 3-15

MR. LENSKE: Q Now, on one of the occasions Mary Yumibe was present, and she was one of my secretaries at that time wasn't she?

A. That is right.

Q. Well, now, Mrs. Hawkins, during the time that you were assisting me did I ever at any time tell or suggest to you that you make any entry or compilation in my tax return that was not in accordance with the records that were available for the purpose?

A. No.

Q. Did I ever at any time suggest to you that you make an error of any kind in your computations?

A. No.

Volume 1, 2/15/63, page 94, 19539, lines 20-25. page 95

Q. (Mr. Lenske) Isn't it a fact that on some of these computations or additions if we were pressed for time, didn't I suggest ... if there was any doubt about it, to give the Government the benefit of any doubt?

A. Yes, that is right.



Q. I see. Now, Mrs. Hawkins, the question I asked you relating to my own returns, was the answer the same respecting Raymond Smith and my returns? Did I at any time suggest to you to put in anything in those returns that wasn't correct?

A. Nothing that I felt wasn't correct did you ever suggest I put into the returns.

Q. Now, when my tax returns were being prepared, when you participated in them, was that usually done in our reception room?

A. Either in the reception room or one of the offices. We worked all over when we were doing it.

Q. Most of the persons doing the work at that time were in the reception room together, weren't they?

A. That is right.

Q. And what I did usually was merely assist in filling gaps that one of the persons helping needed an answer on; isn't that right, Mrs. Hawkins?

A. That is right.

Q. Now, isn't it a fact that during the time that work was being done by the other persons that were helping there was nothing said in your presence that would suggest at any time that my returns be made in any other way than what was correct in accordance with whatever the figures were that were

available?

A. That is right.

page 104

Q In the business relationship that you and your husband had with me from 1953 to 1961, was it necessary for your husband or yourself to have dealings with many, many other people on my behalf?

A Yes.

page 99

Q Now, in relation to any instruments that you signed on my behalf or on behalf of whomever I was acting at the particular time, did I not assure you that if there were any loss of any kind, any liability of any kind, that I would stand good for any such loss or any such liability?

A That is right; you did.

Q Have I in any way broken my word with you at any time?

A No.

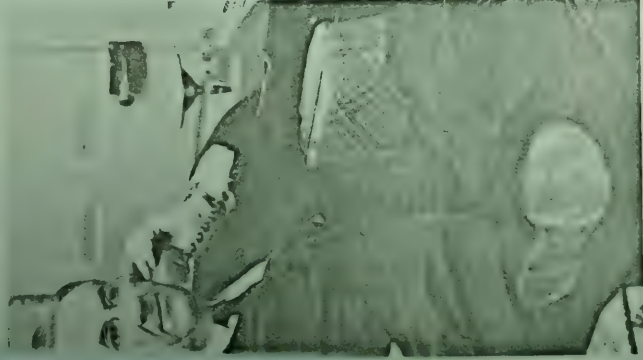
THE COURT: In what manner?

MR. LENSKE: Q In respect to any matter relating to the business that was had between us?

A That is right; no, sir.

**O**n a sunny afternoon in the summer of 1962 a housewife in a suburb of Boston came out of her house and sat on her patio to sunbathe. About 50 yards across the way in a deserted barn a man peered at her through high-powered binoculars. Later that afternoon, another man crept over to her house, made a surreptitious entry through the back door, and proceeded to open a vault in the basement.

In Pittsburgh a Bell Telephone truck was seen pulling up to a telephone pole for the ostensible purpose of making repairs. The men in the truck were not employees of the telephone company, but were working for



*The author, in the U.S. Senate since 1960, chairs a subcommittee which is investigating the Internal Revenue Service. He has been a prosecutor, city attorney, state senator, and lieutenant governor of his state. He has also investigated several corporations, including banks and an insurance firm.*

same organization as the man in Boston. They were there to install an illegal wiretap.

In Washington D.C., another of these men picked the lock of the apartment of a government employee and planted an electronic listening device under a living-room bookcase.

In another city a lawyer and his client sat alone in a conference room and conducted what they thought was a private conversation. Unknown to them their conversation was not only overheard and recorded, but became an innocent-looking mirror stood a man

observing them through the lens of a camera. The criminal invasions of these citizens' privacy would be shocking enough if the Peeping Toms, wiretappers and housebreakers were common criminals. It is much more shocking to learn that they were all accredited agents of the Internal Revenue Service!

The incredible story of how tax investigators have been engaging in premeditated violations of state and federal laws is beginning to unfold in public testimony before the Senate. Even more incredible to relate is the campaign being waged behind the scenes by certain government officials to prevent the American public from finding out about it.

For several years the Senate Subcommittee on Administrative Practice and Procedure has been hearing from people all over the United States who complained that they have been the victims of various abuses perpetrated by special agents of the Internal Revenue Service. Due to the frequency and the serious nature of charges, we felt duty bound to find out whether they were true. Did federal agents really engage in these practices, or were the people who made the charges delinquent taxpayers who had it in for the tax investigators for catching them?

We sent our staff investigator to a few cities to make preliminary inquiries and to report back to us. The information he came up with indicated not only that the charges had substance but that the abuses were flagrant, prevalent, alarming in scope, and that they had been going on for many years.

Before scheduling hearings on the matter, I decided to invite the then Secretary of the Treasury, Douglas Dillon, to my office to discuss our initial findings and to ask him what he knew about wiretapping by tax agents. Secretary Dillon told me, quite truthfully, I am sure, that in all his years in the Department he had never heard of one case of wiretapping by his employees. It was obvious to me that some very fancy covering up was being done at a lower echelon within the Treasury, and I was determined to uncover the truth in public hearings.

Sheldon Cohen, the newly appointed Commissioner of Internal Revenue, was asked to appear as our first witness, and we were privileged to have him. While Mr. Cohen had alleged to office less than six months and could hardly be considered responsible for the past abuses by his employees, he forthrightly acknowledged responsibility for their actions. The commissioner hadn't been on the stand more than a few moments, however, when it became obvious to us that somebody had fed him a mass of misinformation, and that he had a thoroughly distorted picture of what had been going on in his agency.

Commissioner Cohen acknowledged with regret what we knew to be a fact—that illegal wiretapping had been engaged in by IRS intelligence agents. His information, however, was that there were only four isolated cases of such abuses, and that the agents involved had acted entirely on their own and contrary to departmental policy. "I have been talking," said the commissioner, "about four cases where devoted and courageous agents acted in

a misdeed and unauthorized effort to avert some of the terror of organized crime."

The explanation, which I am certain was given in good faith, seemed to portray the wrongdoers as a few well-meaning public servants who acted against orders in the zeal to convict vice lords and racketeers. The commissioner indicated that he had already taken steps to curtail future abuses, and that he felt the situation was under control. He further indicated his concern that a public investigation might weaken public confidence in the service, and that out of loyalty to it, he was doing more harm than good.

While our subcommittee shared Commissioner Cohen's desire to preserve a favorable public image of the service, information then available to us convinced us that not only were issues of greater magnitude involved, but that in view of the misinformation that had been furnished to him, a thoroughgoing investigation was an absolute necessity if public confidence in the service was to continue.

We had evidence from scores of taxpayers, attorneys and tax officials, which established beyond a doubt that the abuses complained of, rather than being isolated, were part of a national pattern. We learned further that the agents who participated in them had been anything but "misguided," that their violations of law and other improper acts were clearly "authorized" by officials in Washington, and that the offensive investigation methods, rather than being directed solely toward abating "organized crime," have also been directed against ordinary taxpayers, their lawyers and accountants.

We discovered that for many years agents have been brought to Washington from all parts of the country to attend a training school at the Technical Investigative Aid School of the Treasury Department, where they are taught the art of lock picking, wiretapping, and the use of other eavesdropping and surveillance devices including sniperscopes, microphones, and spike makes, a veritable arsenal of the weapons of Big Brother.

Upon graduating, the agents have returned to their home offices, where they have been supplied the latest in electronic equipment.

The IRS witnesses have been understood at it, was a doubt who authorized the agency to use this equipment after all wiretapping and listening, and eavesdropping, happen to be criminal acts. The evidence is clear, however, that many of them got authorization by calling the office of the IRS Deputy Chief of Intelligence, which would even furnish wiretap specialists at this, were provided.

The attitude of the Washington office was brought out quite forcibly in the answer the Deputy Chief, when I asked him why he didn't keep a record of wiretaps. He answered that "if I had kept a record for any of my papers, I had asked them, they would be said. You know the regulations, anybody does this is on his own."

He went on to testify that his super knew that wiretapping was going on, and it was in violation of their own regulations, and that they discussed it from time to time, "particularly when we got caught."

*On the next day a chairman of the subcommittee, in a public statement, said that the IRS was doing the best it could to do its job, and that the abuses were not as widespread as it had been reported to be.*

...the impression that improper surveillance methods had been restricted to "organized-crime" cases is simply not in accord with the facts. By no stretch of the imagination can the peering at a sunbathing housewife, or the breaking and entering of homes of ordinary taxpayers, or the sneaking into a lawyer's offices to plant "bugs," or the tapping of public phone booths (a common IRS practice), be considered weapons in the war on organized crime. Nor can the waving of this banner explain away the bullying of attorneys who, when they incurred the displeasure of the agents, were themselves subjected to investigation. Nor can it condone the intimidation of juries if standard practice in tax-evasion cases is to order a background check on jurors). Nor can it excuse the eavesdropping on lawyers and clients in "bugged" conference rooms in IRS offices.

It was in reference to this last practice that Commissioner Cohen's information was extremely inaccurate. At first he told us that there was only one IRS office in which eavesdropping had been done. Later he revised the figure to four or five, and more recently he has informed us that he has discovered that in 24 major cities IRS agents bug the private conversations between taxpayers and their lawyers.

In drawing attention to the inaccuracy of the information supplied to us by the commissioner, I do not mean to imply any attempt at deception on his part, but to point out the galling fact that Mr. Cohen is in the unenviable position of having to get his information from officials who were culpable participants in or accessories to the activities under scrutiny. I base this assertion on the fact that 200 agents of the IRS inspection unit have uncovered not one wiretap, whereas our subcommittee investigation staff consisting of one investigator has in a matter of weeks discovered dozens.

The malignant cancer of police-state tactics in the Internal Revenue Service is too advanced, I fear, to allow for any hope of self-cure. The only way to attack it is to subject it to the glare of public opinion. The American public deserves to know what goes on in the collection of their taxes. After all, it is their money and their Government.

Rather than blaming individual agents for past abuses, it is the intention of our subcommittee to expose the system that trained and equipped them, but somehow failed to equip them with a knowledge of and respect for law. Agent after agent has testified that despite the fact that he was trained to wiretap, no one ever told him that the practice was against the law.

More disheartening to me is the amorality that has arisen from the forced acceptance of improper practices as a way of life. Consider the answers of a Miami agent. I asked him if he would violate the state law in the future, if ordered to do so by his superiors. His answer was a very respectful, and very frightening "Yes, sir."

I then asked him if he realized that it is the basis of a police state for an officer to take the law in his own hands and violate it. His answer again displayed

During the course of the hearings, I sat listening to the agents' testimony, the thought kept coming to my mind that the men who are the instruments of the systematic invasions of privacy are themselves the most tragic victims of the system. With few exceptions they impressed me as decent, hard-working, well-meaning government servants. I am certain that I sensed in some of them a feeling of shame for their acts, and I cannot help but conclude that the self-respect and morale of the service has been severely damaged.

I'm sure that I express the opinion of other members of my subcommittee when I state that we intend to help restore the respect, despite any attempt to discredit us by making it appear that we are impeding the war on crime. We share the desire to bring criminals to justice, but we also insist that justice requires that this be done by *legal* means.

Although our fight against police-state methods has just begun, and we realize the formidable obstacles ahead, I am optimistic about the future. Indeed, I feel that much has already been accomplished. Perhaps the most encouraging result of our efforts to date has been the reaction of President Johnson who, when our findings were brought to his attention, promptly issued an order banning all wiretaps except in national-security cases, and then only by members of the FBI, with the express authorization of the Attorney General.

The Commissioner of Internal Revenue has taken positive steps to limit future abuses. He has issued a directive restricting the use of wiretaps and eavesdropping equipment to certain specified cases. While we are not satisfied that adequate precautions have as yet been taken to prevent further abuses (the Treasury school still conducts courses in lock picking and wiretapping, and the commissioner has indicated that none of the burglary and listening devices will be disposed of), we recognize the difficulties of trying to reverse long-established policies.

The one thing that we promise the American people is that we will not rest until *all* illegal investigative methods against *all* citizens have been stopped. Meanwhile the investigation will continue. We're convinced that we have barely scratched the surface in exposing the IRS Big Brother. To combat him we will need the help of an aroused public, of individuals jealous of their privacy, of lawyers who will fight even when they know that they may be singled out as his next victims.

It has long been recognized that the power to tax is the power to destroy. In our lifetime this precept has been so refined as to demonstrate clearly that the power to investigate taxes is the power to destroy. Freedom cannot survive so long as this power is in the hands of men who have ignorance of or contempt for the law.

The only way to fight Big Brother is by dragging him out in public and keeping the spotlight shining on him. It is our intention to do just that.

Edward V. Goss





In the United States Court of Appeals  
for the Ninth Circuit

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REUBEN G. LENSKE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

---

On Appeal From the United States District Court  
for the District of Oregon

---

BRIEF OF THE APPELLEE

---

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*Acting Assistant Attorney General.*

JOSEPH M. HOWARD,  
CHARLES J. ALEXANDER,  
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Department of Justice,  
Washington, D. C. 20530.*

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FILED

JAN 10 1966

WILLIAM F. WILSON, Clerk





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**In the United States Court of Appeals  
for the Ninth Circuit**

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No. 20,448

REUBEN G. LENSKE, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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**On Appeal From the United States District Court  
for the District of Oregon**

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**BRIEF OF THE APPELLEE**

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**OPINIONS BELOW**

The order of the district court denying the defendant's motion for a new trial and the order denying the defendant's motion to disqualify the trial judge (S.R. 88)<sup>1</sup> on the remand directed by this Court, are not reported.

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<sup>1</sup> References to the District Court Clerk's Transcript of Record in this proceeding numbered 20,448 are designated, "S.R.". Record References to the pending appeal from the judgment of conviction in No. 19,539 are designated, "R".

There was no opinion below on the judgment convicting the defendant of tax evasion and of wilfully subscribing to a false income tax return under penalties of perjury which appears on page 1135 of the District Court Clerk's Transcript of Record in No. 19,539. The Court made detailed findings of fact and conclusions of law which appear in the District Court Clerk's Transcript of Record at pages R. 1107-1134.

### JURISDICTION

The orders of the court below denying the defendant's motion to disqualify the trial judge and for a new trial on the grounds of newly discovered evidence, were entered on August 13, 1965 (S.R. 88, 126). A notice of appeal from the denial of the defendant's motion to disqualify the trial judge was filed in open court on August 13, 1965 and an amended notice of appeal filed on August 23, 1965 (S.R. 126-127). A notice of appeal from the denial of the defendant's motion for a new trial was also filed on August 23, 1965 (S.R. 127). The jurisdiction of this court is invoked under 28 U.S.C., Section 1291.

The defendant's appeal from the judgment below convicting him of tax evasion and of filing a false income tax return under penalties of perjury is pending before this court as No. 19,539 and was consolidated with the instant appeal by order of this court of April 26, 1965.

### COUNTER-STATEMENT OF THE CASE

The evidence leading to the conviction of the defendant on April 22, 1964, for tax evasion and for

filing a false income tax return, after eight weeks of trial and over 350 witnesses, followed by a bench trial after the defendant was granted a mistrial on the death of the first trial judge, the Honorable John R. Ross (R. 1160), is discussed in the Government's brief in No. 19,539 pending before this court.

The evidence and record in the instant appeal may be summarized as follows:

### 1. Allegations of Bias and Prejudice

Over three months after the remand of this court for the "limited purpose of entertaining appellant's pending motion for a new trial" (April 26, 1965 Order) and after the defendant's motion for a new trial was set down for hearing before the trial judge, the defendant filed a motion seeking an order that his motion for a new trial be heard by a judge other than the trial judge (S.R. 59, 81). The defendant filed a thirteen page affidavit of prejudice purporting to show that the trial judge was prejudiced against him (S.R. 61-73). In his affidavit the defendant makes allegations in the form of unsupported conclusions and opinions, laced with contumacious language, that go to the conduct and rulings of the Court during the trial below.

For the first ground of his motion (S.R. 61) the defendant, who had a net worth as of December 31, 1958 of \$343,821.46 (R. 1107), who did not file an affidavit of indigency, and who did not elect to proceed on appeal in forma pauperis, alleges that the trial judge sought to impede and obstruct his appeal by reason of the Court's request that the clerk's copy



of the transcript below not be filed on appeal until an order was entered settling questions arising out of the defendant's efforts to use the clerk's copy of the transcript without paying reporter's charges.

The defendant did not detail his second ground of alleged prejudice but merely adopts his brief filed in No. 19,539 and "all of my statements therein", as reflecting unspecified errors stemming from prejudice. (S.R. 63.)

The third basis of prejudice alleged by the defendant is directed toward the holding by the trial court after a hearing (R. 991-1003), as the late Judge Ross had earlier held after a hearing (R. 1152, 10/26/62 Tr.)<sup>2</sup> and again held after a second hearing (R. 1154), that the defendant consented to an examination of his records and copies made of these records were therefore admissible in evidence. The Court is respectfully referred to pages 59-64 and 83 of the Government brief in No. 19,539 where the detailed findings of the Court below (R. 991-1003) are discussed in some detail.

For a fourth ground of alleged prejudice the defendant has directed his allegations to the argument below where argument was heard by the Court for three full days (See 4/21/64 Tr. 2623-2624) and until midnight of the third day (2/26/64 Tr., 2/27/64

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<sup>2</sup> References to the forty volumes of testimony at the first trial are designated by volume and page number, e.g., Vol. 1 p. 1; References to the volumes of testimony at the second trial are designated by date and by page as is the transcript of the hearing below on the defendant's motion for a new trial, e.g. 8/13/65 Tr. 1.

Tr. and 2/28/64 Tr. Vols. A, B, and C). At approximately 11:00 on the evening of the third day of argument (2/28/64 Tr. 2608), the defendant sought an "indefinite time" (2/28/64 Tr. 2590) to continue his counsel's completed argument on intent. The Court, commenting that it was not particularly seemly for the defendant to argue his own intent and pointing out that the defendant's counsel had just argued the case (2/28/64 Tr. 2590), granted the defendant an additional thirty minutes for argument—which the defendant used (2/28/64 Tr. 2589-2607). In his affidavit of prejudice, the defendant alleges that the trial judge resented his desire to argue his own case and did not want to hear him "to as much as an extent as possible" (S.R. 63-64).

The defendant's fifth ground for alleging prejudice is directed to the hearing held on the defendant's first motion for a new trial where the trial judge permitted the defendant to argue from 9:00 a.m. until 4:45 p.m. on April 21, 1964, with both the defendant and his counsel continuing the argument the next day (4/21/64 Tr. 4/22/64 Tr.). The defendant alleges in his affidavit (S.R. 64) that the trial judge was unwilling to hear him out fully.

The remaining allegations in the defendant's affidavit are directed to his disagreement with rulings of the Court below on his claimed depreciation allowance (S.R. 64-70), on the Obye-Durkin transaction (S.R. 70), the Eleanor Bertrand Account Receivable (S.R. 71) and an unspecified item designated only as "a 1959 transaction" (S.R. 73), followed by an allegation that the trial judge shifted the burden of proof

(S.R. 73). The evidence on the rulings of the Court is treated in the Government Brief in No. 19,539 and in the argument section of this brief.

## 2. Record of Brady Documents

The defendant filed his own affidavit as the sole support for that portion of his motion relating to documents taken by one John Brady (S.R. 31). In his affidavit the defendant alleged that he ascertained, "as a result of depositions that I took of John M. Brady, Norman Phifer and George Nyman", agents of the Internal Revenue Service, that John Brady stole numerous documents from the defendant's office which Brady turned over to the agents of the Internal Revenue Service who retained possession of the "documents and/or photostatic copies thereof and/or microfilm thereof" in violation of defendant's rights, and that, "the inspection of said records was essential in the preparation of the defendant's defense." (S.R. 31.)

The evidence and record supporting the ruling below as developed in the same depositions taken by the defendant of John M. Brady, Norman H. Phifer, Chief, Field Audit Branch, Internal Revenue Service, and Revenue Agent Nyman and the affidavit and deposition of Special Agent Albert Deschenes, are as follows:

John M. Brady formerly worked for the defendant. Sometime in 1960 when he was still working for the defendant, Brady took a number of the defendant's documents that were on a table in the library of the defendant's office. Brady never told anyone that he

was going to take the documents. He specifically testified that no one in the employ of the United States suggested that he take these documents and that he voluntarily took the documents on his own without the knowledge of assistance of anyone in the employ of the United States (Brady, Ex. C, pp. 113, et seq.).

On or about November 10, 1960, Brady made an unsolicited visit to the office of Norman Phifer, Chief, Field Audit Branch, Internal Revenue Service, and told him that he had the documents. This was the first time Phifer heard of the documents. Phifer talked to Brady for about five minutes and arranged for Brady to meet with representatives of the Intelligence Section (Brady Dep., Ex. C, pp. 115-116; S.R. 46).<sup>3</sup> The meeting was held the same day and was attended by, among others, the Chief of Intelligence, Jack Savage, Special Agent Deschenes, and Revenue Agent Nyman. Brady had not discussed the defendant's affairs with any employee of the United States prior to his meeting with Phifer (Brady Dep., Ex. C, pp. 116-117; Nyman Dep., Ex. A, pp. 32-34; Deschenes Affidavit, R. 48; Deschenes Dep., Ex. E, p. 11). At the meeting Brady displayed the documents he had taken from the defendant's office and all of the documents were returned to Brady the same day (Deschenes Affidavit, R. 49; Deschenes Dep., Ex. E, pp. 12-16; Brady Dep., Ex. C, p. 121). Brady then made a microfilm of the documents and turned it over to

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<sup>3</sup> Exhibits admitted at the hearing on the defendant's motion for a new trial were designated by letter (e.g. Exhibit A) and are listed in the District Court's transcript of Record at page 126.



the Internal Revenue Service (Deschenes Affidavit, R. 48-49). He "tore (the originals) up and threw them in the garbage can and that was the end of it" (Brady Dep., Ex. C, pp. 120-121).

Subsequent to this meeting Brady displayed a number of additional documents to Special Agent Deschenes on December 9, 1960 which Brady had also obtained on his own without any aid or suggestion from any employee of the United States (Brady Dep., Ex. C, pp. 113 et seq.; Deschenes Affidavit, R. 49; Deschenes Dep., Ex. E, p. 10). After examining the documents and determining that they were of no value to the investigation, Deschenes returned the documents to Brady within a month after receiving them (Brady Dep., Ex. C, p. 125; Deschenes R. 49; Deschenes Dep., Ex. E, pp. 19-22). The Internal Revenue Service has never had copies or microfilm of these documents (ibid). On January 10, 1961, Brady gave Deschenes a photocopy of a 1960 timber transaction (Ex. F.; Deschenes Dep., Ex. E, p. 23).

Brady was told by Special Agent Deschenes that none of the documents he had displayed were of any value to the investigation and Brady's claim for a reward was rejected (Brady Dep., Ex. C, pp. 125-126). The agents had previously obtained from third parties, and from data on the defendant's checks, the information in the documents displayed by Brady. None of the documents were introduced in evidence or used by the Government for leads, or in any other way (Nyman, Ex. A, Dep. p. 35; Deschenes Affidavit, R. 49; Deschenes Dep., Ex. E).

At the hearing below the defendant sought to take the oral testimony of John Brady, Special Agent Deschenes and Revenue Agent Nyman. The defendant made an offer of proof that was limited to an offer to show that John Brady was an informant for the Internal Revenue Service, and that Special Agent Deschenes and Revenue Agent Nyman had the documents taken by John Brady, a microfilm of the documents, and a 1960 timber agreement, when the agents filed affidavits in 1962 stating that they had no documents of the defendant in their possession. The defendant made no showing and no offer of proof as to how he was prejudiced by the taking of his documents and the Court sustained the objection to the taking of oral testimony (8/25/63 Tr. 81-82, 91-92).

The defendant saw the microfilm of the documents, and a print of the microfilm, prior to filing his affidavit below and prior to the hearing below (S.R. 31-32, Ex. A, pp. 29-30, 8/13/65 Tr.). The defendant was also told about the photocopy of the 1960 timber agreement almost four months prior to the hearing below and he did not even ask for a copy (Deschenes Dep., on 4/28/65, Ex. E, p. 23).

In his affidavit, and at the hearing below, the defendant did not point to a single instance, either by allegation, offer of proof, or otherwise, where any of the documents taken by Brady were used by the Government or would have been helpful in the preparation of his defense (S.R. 31, 47; 8/13/65 Tr. 77-92).

### 3. Net Worth Items

The defendant alleges in his motion for a new trial (S.R. 1-41) and sets forth in his brief (Defs. Br. p.



6) some ten transactions in support of his motion for a new trial. The evidence in support of the denial of the defendant's motion is discussed in Point III of the argument section of this brief.

## SUMMARY OF ARGUMENT

### I

A. There was no prejudice below. The trial judge gave the defendant all of his rights, supplemented them with extraordinary privileges such as an adjournment at the conclusion of the trial for the sole purpose of giving the defense an opportunity to seek further evidence to support its case, and heard the defendant both from the witness stand, and in argument, time and time again, such that the defendant's only real complaint is that the trial judge gave recognition to the principle that "impartiality is not gullibility".

B. The trial judge clearly had authority in the first instance to pass upon the sufficiency of the defendant's affidavit of bias and prejudice and did not cease to have power to entertain the defendant's motion for a new trial by virtue of the fact that the defendant filed a notice of appeal from the denial of his motion to disqualify the trial judge.

### II

No error was committed below when the trial judge did not hear oral testimony on the taking of the defendant's documents by an employee of the defendant.

A. The defendant has no standing to complain here of undesignated portions of depositions admitted in their entirety as exhibits below where the depositions were relied on by the defendant and where the defendant did not by objection, motion to strike, or otherwise, designate those portions of the depositions to which he now objects—and has yet to designate.

B. No conflict of a material fact was developed below but even if there had been a conflict the rule is well established that a motion for a new trial based on newly discovered evidence may be decided without live testimony.

C. It is eminently clear on the record below that no useful purpose would have been served by the taking of oral testimony. First, the defendant's documents were taken and turned over to the Internal Revenue Service for examination by the defendant's then employee, John Brady, who acted on his own without the assistance, suggestion, or knowledge, of anyone in the employ of the United States. The documents in question were not introduced into evidence below and were not used by the Government, either as leads or otherwise, but even if they had been used by the Government it has long been established that there is no violation of rights secured by the Fourth and Fifth Amendment to the United States Constitution where, as here, a private person acting on his own takes the documents of another and turns them over to Government representatives. Second, the defendant made an offer of proof below but his offer was limited to a showing that John Brady was an informant for the

Internal Revenue Service who made it a practice to bring stolen documents to the Internal Revenue Service, and that Internal Revenue Service Agents Deschenes and Nyman had the documents taken by John Brady, a microfilm of the documents, and a photocopy of a 1960 timber agreement when the agents filed affidavits in 1962 stating that they had no documents of the defendant in their possession. As pointed out above, Brady took the documents on his own and, except for a photocopy of a 1960 timber agreement, Deschenes returned all of the documents to Brady well over a year prior to the filing of his affidavit, retaining only an unprinted microfilm of the documents. The photocopy pertains to a 1960 transaction and has yet to be shown as material, which is an express requirement of Rule 16 of the Federal Rules of Criminal Procedure pursuant to which Deschenes' affidavit was filed, and has no bearing on this case. The defendant, who had seen the microfilm, and a print of the microfilm, almost seven months before the hearing below, did not offer to prove below and has yet to point to a single instance where any of the documents in question were used by the Government or would have been helpful in the preparation of his defense.

### III

It is well settled that a motion for a new trial on the ground of newly discovered evidence is addressed to the District Court's discretion, the exercise of which, in the absence of abuse, is not reviewable. There was no abuse of discretion below but there would have been if the Court had granted the defend-

ant a new trial on the basis of nothing more than a rehash of the trial and the submission of material that the defendant elected not to present at the trial.

## ARGUMENT

### **I. There Was no Prejudice Below Where the Trial Judge not Only Granted the Defendant all of His Rights, But Supplemented Them by Extraordinary Privileges, and the Attack on the Jurisdiction of the Trial Judge Is Frivolous**

1. At the trial below the trial judge permitted the defendant to testify at will—a privilege the defendant exercised to the hilt (Lenske, 7/14/63 Tr. pp. 743-864; 7/15/63 Tr. pp. 867-1027; 7/16/63 Tr. pp. 1036-1158; 7/17/63 Tr. pp. 1239-1270; 7/20/63 Tr. pp. 1582-1587; 8/15/63 Tr. pp. 1655-1762; 8/16/63 Tr. pp. 1876-1893).

After the Government had concluded its case in chief, after the defense had concluded its case, after rebuttal, or, in short, when the trial was over, the defense asked for, and was granted by the trial judge, the extraordinary privilege of an 11 day adjournment to seek further evidence to support its case (7/29/63 Tr. 1598-1607.). Trial was thereafter had for two full, nine to five fifteen, days (8/15/63 and 8/16/63 Tr.). Both sides then submitted extensive briefs (R. 407-794) and oral argument was thereafter heard for three days, with the last session going until midnight (2/26/64 Tr., 2/27/64 Tr., 2/28/64 Tr., Vols. A, B and C). The trial judge also heard argument for over a day, almost exclusively by the defendant, on the defendant's first motion for a new trial (4/21/64

Tr., 4/22/64 Tr. 2788-2844). It is in this framework that the defendant complains of not being heard "to as much an extent as possible" (S.R. 64, line 2).

2. The affidavit of prejudice filed by the defendant is without substance, and admittedly so, as shown by the defendant's admission during the argument below that the "cases are clear that the bias or prejudice charged must be a personal bias and not a bias growing out of rulings in the case" (8/13/65 Tr. 2-3). In this much the defendant was correct and he thereby conceded his ill conceived charge of prejudice grounded on unsupported conclusions concerning the rulings of the trial judge *Berger v. United States*, 255 U.S. 22, 31, *Ex. Parte American Steel Barrel Company*, 230 U.S. 35, 43, *Chessman v. Teets*, 239 F.2d 205, 215 (C.A. 9th) reversed on other grounds, 354 U.S. 156; *Willenbring v. United States*, 306 F.2d 944 (C.A. 9th).

3. At the hearing set down to hear the defendant's motion for a new trial the Court first heard the defendant's motion to disqualify the trial judge. Immediately following the denial of his motion the defendant filed a notice of appeal from that order in open Court. After contending that the notice of appeal deprived the Court of jurisdiction, the defendant proceeded to argue his motion for a new trial (8/13/65 Tr. 14-16). The defendant has pointed to no authority for his frivolous contention (Defs. Br. pp. 7-12) that the trial judge was deprived of jurisdiction and committed error by entertaining the defendant's motion for a new trial after the defendant



filed a notice of appeal from the denial of his motion to disqualify the trial judge. The trial judge clearly had authority in the first instance to pass upon the sufficiency of the defendant's affidavit, *Taylor v. United States*, 179 F.2d 640, 644 (C.A. 9th) and cases cited, and did not cease to have power to act by virtue of the defendant's transparent and untimely (28 U.S.C., Sec. 144) attempt to obstruct and pervert orderly judicial procedures, *Ex Parte American Steel Barrell Co.*, 230 U.S. 35, 43, *In Re Union Leader Corporation*, 292 F.2d 381, 383 (C.A. 1st), certiorari denied 368 U.S. 927, *United States v. Hetherington*, 279 F.2d 796 (C.A. 7th), certiorari denied 364 U.S. 908.

In the final analysis the defendant has sought to create prejudice where there was none. The defendant is in no position to complain because the trial judge gave recognition below to the principal that "impartiality is not gullibility," *In Re J. P. Linahan*, 138 F.2d 650, 654 (C.A. 2d).

## II. No Error Was Committed Below When the Trial Judge, After the Defendant Had Failed to Make a Meaningful Offer of Proof, Did Not Take Live Testimony on the Taking of the Defendant's Documents by an Employee of the Defendant.

1. The defendant has designated a series of alleged errors below which go to the failure of the trial judge to take live testimony on that portion of the defendant's motion relating to the taking of his documents by his then employee, John M. Brady (Defs. Br., Specifications of Errors Nos. 3-8). In support of his motion, the defendant filed his own affidavit which was expressly grounded on depositions taken by the



defendant of John M. Brady, Norman Phifer, Chief, Field Audit Branch, Internal Revenue Service and Revenue Agent George Nyman (S.R. 31). The Government filed its opposition to the defendant's motion which was based on the same depositions taken by the defendant and the affidavit of Special Agent Albert P. Deschenes (S.R. 45-47). The defendant thereafter took a second deposition of Revenue Agent Nyman and John M. Brady while the Government took the deposition of Albert P. Deschenes, which was attended by the defendant who cross examined Deschenes. The depositions were relied on by the defendant in the first instance (S.R. 31, 85-86) and admitted as exhibits to the hearing below on the motion of the Government (Exs. A-E, 8/13/65 Tr. 81, 89). Although the defendant did not move to strike any portion of the depositions when they were admitted below (*ibid*), the defendant now argues (Defs. Br. p. 27) that it was an "abuse of discretion" to admit the complete depositions because portions of the depositions, not designated by the defendant below and not designated here, contain prejudicial and irrelevant matter. This is idle argument and even if there had been any error it was "waived by the defendant's failure to preserve the alleged error for review," *United States v. Vanover*, 339 F.2d 987 (C.A. 9th), *United States v. Bush*, 267 F.2d 483, 488 (C.A. 9th), *Duke v. United States*, 255 F.2d 721, 727 (C.A. 9th), certiorari denied, 357 U.S. 920.

2. No conflict of a material fact was developed in the depositions where the defendant sought and failed to find support for his allegations. But even if there

had been a conflict the rule is well established that a motion for a new trial based on newly discovered evidence may be decided without live testimony, *United States v. Johnson*, 327 U.S. 106, 111-113; *Hillman v. U.S.*, 192 F.2d 264, 272 (C.A. 9th), certiorari denied, 225 U.S. 699; *Ewing v. United States*, 135 F.2d 633, 637-638 (C.A. D.C.), certiorari denied, 318 U.S. 776; *United States v. Troche*, 213 F.2d 401, 403 (C.A. 2d.).

3. It is eminently clear on the record below that no useful purpose would have been served by the taking of oral testimony. Thus, the defendant basically offered to prove only two points on the Brady documents in his offer of proof below: (1) that John Brady was an informant for the Internal Revenue Service, known to be such by the agents, and that it had been the practice of Brady to bring stolen documents to the Internal Revenue Service; and (2) that Agents Deschenes and Nyman had the documents taken by John Brady, a microfilm of the documents, and a photocopy of a timber agreement, when the agents filed affidavits in 1962 stating that they had no documents of the defendant in their possession (Defs. Br. pp. 29-30). The defendant sought to establish these points through oral testimony of John Brady and Revenue Agent Nyman, both of whose depositions had already been taken twice by the defendant (Exs. A, B, C, D) and Special Agent Deschenes who had also been previously examined by the defendant (Ex. E).

As to the first point, John Brady admitted taking the defendant's documents but he specifically testified

when his deposition was taken by the defendant: that no one in the employ of the United States even suggested that he take the documents which he voluntarily took without the knowledge or assistance of anyone in the employ of the United States (Brady Dep. Ex. C, pp. 113, et seq. 116-117); that he made an unsolicited visit to the Internal Revenue Service with the documents which were thereafter returned and he tore them up and threw them in the garbage can (ibid, pp. 115-116, 120-121, 125). Brady was told by Special Agent Deschenes that the documents he had displayed "were absolutely of no value" to the investigation of the defendant's tax matters and Brady's claim for a reward was rejected (ibid, pp. 122, 125-126). Revenue Agent Nyman, whose deposition was twice taken by the defendant, also testified that he did not assist, suggest, or even know that Brady had taken the defendant's documents until Brady produced the documents on his unsolicited visit to the Internal Revenue Service—which was the first time Nyman ever discussed the defendant's tax affairs with Brady (Nyman Dep. Ex. A, pp. 32-38). To the same effect see the affidavit (S.R. 48) and deposition (Ex. E, pp. 12-14, 19, 22-23) of Special Agent Deschenes. In short, the defendant failed to make a showing that any representative of the United States had any connection whatsoever with the taking of his documents by his former employee.

The documents in question were not introduced into evidence below and were not used by the Government either as leads or otherwise (R. 47-49, Nyman Dep., Ex. A, p. 35). But even if they had been, it has

long been established that there is no violation of rights secured by the Fourth and Fifth Amendments to the United States Constitution where, as here, a private person acting on his own, without any assistance from Government representatives, takes the documents of another and turns them over to Government representatives, *Burdeau v. McDowell*, 256, U.S. 465, 476, and Cf. *United States v. Goldberg*, 330 F.2d 30 (C.A. 3d).

As to the second point, the defendant has scrupulously avoided any discussion in his brief relating these documents to the requirements for a new trial. This was also the case below (8/13/65 Tr.) and the defendant would now seek solace out of the denial by the Court below of the defendant's request to take oral testimony. But when the defendant made an offer of proof below his only offer that touched upon the documents taken by John Brady was that he would show that John Brady was an informant for the Internal Revenue Service and that Internal Revenue Agents Deschenes and Nyman made false affidavits in September, 1962 when they stated that they did not have in their possession any documents belonging to the defendant (8/13/65 Tr. 77-91, Defs. Br. 31). As pointed out above, except for a photocopy of a 1960 timber agreement (Ex. F), Deschenes returned all of the documents to Brady well over a year prior to the filing of his affidavit (R. 44-45, S.R. 48-49, Brady Dep. Ex. D, p. 22; Deschenes Dep. Ex. E, pp. 16, 19-22), retaining only an unprinted microfilm of the documents (S.R. 48-49, Deschenes Dep., Ex. E, p. 17). The photocopy pertains to a 1960 timber trans-



action (Ex. F), has yet to be shown as material (which is an express requirement of Rule 16 of the Federal Rules of Criminal Procedure pursuant to which the Deschenes affidavit was filed), and has no bearing whatsoever on the instant case. It is noteworthy that, when the defendant was told about the photocopy some four months prior to the hearing below, he never even asked for a copy (Deschenes Dep., Ex. E, p. 23). It was the Government who made it a part of the record below. (8/13/65 Tr. p. 139; S.R. 126, 8/13/65, Order, Blotter Entry.) In this same vein, the microfilm and the print of the microfilm were made available to the defendant on January 27, 1965 (Nyman Dep., Ex. A, pp. 29-30, 39), approximately two weeks prior to the filing of the defendant's affidavit of February 12, 1965 (S.R. 31) and almost seven months prior to the hearing below on August 13, 1965. Significantly, the defendant did not even make the microfilm and the print of the microfilm a part of the record on this appeal.<sup>4</sup> It is in this fashion that the defendant pretty much admits the total absence of any support for his bid for a new trial by his failure to allege facts below, make an offer of proof, or even discuss in his brief here, how the documents in question comprise evidence and, if they are evidence, how this evidence meets the requirements that to obtain a new trial the evidence must be, among

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<sup>4</sup> See the copy, lodged with the clerk, of the letter of October 5, 1965, from Government Counsel to the defendant suggesting that the defendant make the necessary arrangements if he wanted the microfilm and the print of the microfilm to be a part of the record on appeal.

other things, (A) more than merely cumulative or impeaching, (B) material to the issues involved, and (C) evidence that would probably produce an acquittal, *Gallegos v. United States*, 295 F.2d 879, 881 (C.A. 9th), certiorari denied, 368 U.S. 988; *Pitts. v. United States*, 263 F.2d 808, 810 (C.A. 9th), certiorari denied, 360 U.S. 919.

In short, the defendant has never offered to prove below and has yet to point to a single instance where any of the documents in question were used by the Government or would have been helpful in the preparation of his defense.

**III. It Would Have Been an Abuse of Discretion if the Trial Judge Had Granted the Defendant a New Trial on the Basis of a Rehash of the Trial and Material That the Defendant Elected to not Present at the Trial.**

It has long been settled that a motion for a new trial on the ground of newly discovered evidence "is addressed to the District Court's discretion, the exercise of which, in the absence of abuse, is not reviewable," *Naval v. U.S.*, 278 F.2d 611, 615 (C.A. 9th) and the host of cases cited; *Morgan v. United States*, 301 F.2d 272, 274 (C.A. 9th). Otherwise stated, the ruling of the trial court should remain undisturbed except for most extraordinary circumstances, *United States v. Johnson*, 327 U.S. 106, 111. It is equally well settled that before the motion may be granted five requirements must be met: (1) the evidence must be newly discovered after trial, (2) there must be diligence on the part of the movant, (3) the evidence must be more than merely cumulative or impeach-



ing, (4) the evidence must be material to the issues involved, and (5) the evidence must be such as would probably produce an acquittal, *Gallegos v. United States*, 295 F.2d 879, 881 (C.A. 9th) certiorari denied, 368 U.S. 988; *Pitts v. United States*, 263 F.2d 808, 810 (C.A. 9th), certiorari denied, 360 U.S. 919. Viewed in the light of these principals it is clear that the Court below was eminently correct in denying the defendant's motion.

In his brief, the defendant has mislabelled as newly discovered evidence the mass of material submitted in support of the series of transactions set forth in the defendant's brief at pages 43 through 73. This material is nothing more than a rehash of the trial and a poorly disguised effort to present material that the defendant elected (for a particularly interesting example see the discussion below on the Tarlow transaction) not to present at the trial. In each and every instance the transactions raised by the defendant were ventilated at the trial. Seven of the witnesses named by the defendant in his motion testified at the trial where they were examined on their transactions with the defendant. Moreover, each of these witnesses testified at the *first* trial and, with one exception, the defendant chose not to call them as witnesses at the second trial. These witnesses are:

<u>Witness</u>	<u>Transcript Reference</u>
1. Eleanor Bertrand	Vol. 15, pp. 112-127; 7/19/63 Tr. pp. 1489-1508
2. Margaret Doan	Vol. 18, p. 161-181
3. Richard D. Bennett	Vol. 22, pp. 120-122
4. O. G. Larson	Vol. 16, pp. 59-68
5. A. L. Prater	Vol. 7, pp. 12-89
6. W. K. Royal	Vol. 6, pp. 196-211
7. Rebecca Tarlow	Vol. 20, pp. 131-141

*Eleanor Bertrand Accounts Receivable* (Defs. Br. p. 43). The only one of the above witnesses the defendant chose to call at the second trial was Eleanor Bertrand who is a widow with two children and on whose home the defendant held a mortgage (7/20/63 Tr. 1501-1502). After hearing, and observing, and questioning, Mrs. Bertrand (7/20/63 Tr. 1489-1508) and comparing her testimony at the second trial with the testimony she gave at the first (Vol. 15 pp. 112-127), including testimony contrary to her previously sworn affidavit which Mrs. Bertrand had read before she signed (7/20/63 Tr. 1489-1491, 1501-1502, 1573-1574), the trial judge was unable to give any credence to her testimony (Finding 32, R. 1027, 7/20/63 Tr. 1063). In this connection see *Maldonado v. United States*, 325 F. 2d 295, 297 (C.A. 9th), and cases cited. For a discussion of other aspects of this transaction the Court is respectfully referred to the Government's Brief in No. 19,539 at pages 19-21.

*Rebecca Tarlow Liability* (Defs. Br. p. 68). An interesting example of the defendant's technique for

seeking a new trial is the Rebecca Tarlow liability only a selective portion of which is discussed by the defendant in his brief (Defs. Br. pp. 68-70). At the first trial below Mrs. Tarlow testified with respect to her affidavit reflecting the amounts owed to her by the defendant (Vol. 20, pp. 131-141): "Yes, that is correct because we went through these very thoroughly at the time." The defendant cross-examined Mrs. Tarlow himself and did not challenge her testimony (Vol. 20 p. 141). This all took place on March 21, 1963. At the first session of the second trial which began on July 8, 1963, or some two and one-half months after the first trial ended in a mis-trial (R. 1160, 4/25/63 Order, Blotter Entry), the defendant did not call Mrs. Tarlow to the witness stand. Nor did the defendant call Mrs. Tarlow to the witness stand at the second session of the second trial which began on August 15, 1963 after an adjournment at the close of the trial so that the defense might seek additional evidence (7/20/63 Tr. 1607; R. 1161, 7/19/63 Order, Blotter Entry). On these facts alone it is clear that proposed testimony by Mrs. Tarlow is not newly discovered evidence, but evidence, if it be such, that was clearly discoverable by the defendant, of all people, compounded by a complete absence of diligence, *Pitts v. United States*, 263 F. 2d 808, 810 (C.A. 9th). But the defendant went further—in a good illustration of the technique adopted by the defendant in a number of instances both below and here, e.g., the defendant's previously referred to treatment of the record in his motion to disqualify the trial judge; and the defendant's complaint (Defs. Br. p.

27) at the admission below of the depositions relied on in the defendant's motion for a new trial. (S.R. 31).

In this instance we have reference to the fact that in support of his motion for a new trial the defendant furnished the Court with extracts of a deposition the defendant took of Mrs. Tarlow (S.R. 58(a), 58(g)-58(j)). For rather apparent reasons, the defendant did not furnish the Court with other highly relevant and illuminating portions of the deposition. Thus, during the same deposition, Mrs. Tarlow testified that she was subpoenaed as a witness at the trial, responded to the defendant's subpoena, was interviewed by the defendant at the Court house, and then not called as a witness because the defendant, who was "practically hysterical," was not satisfied with her proposed testimony (Opposition to Motion for New Trial, Ex. A, S.R. 100-103; Tarlow Dep., Ex. H, pp. 54-57). It was in this fashion that the defendant brought himself squarely within the rule that, "One cannot speculate upon failure to call a witness and thereafter present such testimony as newly discovered", *Shibley v. United States*, 237 F. 2d 327, 332 (C.A. 9th).

*The Doan—Mary Nevens Gift Certificate Transaction* (Defs. Br. p. 56). In an argument that is incredible in the light of the record below and represents a complete switch of position (Defs. Br. p. 57, 1st paragraph; Gov. Br. in No. 19,539 pp. 55-56) the defendant would now supplement his scheming manipulations (described in the Government Brief in No. 19,539 at pages 35 through 45) by having this Court

grant him a new trial on the basis of a thoroughly litigated transaction in which the defendant was a highly active and imaginative participant throughout (e.g., Lenske, Vols. 37 pp. 54-72, 83-91, 148-149, Vol. 36 pp. 120-125), and specifically on the basis of an affidavit of Mrs. Doan (S.R. 15-18) who testified at the first trial where she said nothing about a loan to the defendant—mentioned for the first time in her affidavit. When cross-examined by the defendant Mrs. Doan was not even asked about an alleged loan (Vol. 18 pp. 161-181). And the defendant, who testified at length on his dealings with the Doans, never once mentioned on the witness stand a loan that the defendant would now ask this Court to both accept and stamp as new evidence (e.g., Lenske, Vol. 36 pp. 120-125, Vol. 37 pp. 54-60, 148-149). Significantly, whether for reasons similar to those in the Rebecca Tarlow incident, or otherwise, we do not know, the defendant did not call Mrs. Doan as a witness at the second trial.

We note that in her affidavit Mrs. Doan alleges that “in anticipation” of the trade of her property for the properties listed in the Nevens estate by the defendant, “we (Mr. & Mrs. Doan) conveyed our home property to Mrs. Nevens” (S.R. 16). In other words, a trade was still contemplated by the Doans at the time of the conveyance and Mrs. Doan was to receive property—not money—for her home property. But the record fact is that Mr. and Mrs. Doan conveyed their home property to Mary Nevens by a deed dated and signed on December 31, 1958 (Ex. 727, F. 213; Doan, Vol. 18 pp. 172-174) or on the same date that the



\$28,500 down payment check was received (Vol. 36, p. 123; 7/12/63 Tr. p. 852) which the defendant now contends was loaned to him by the Doans. In short, even on the Doan affidavit account, the Doans had no money coming because the trade was on and the Doans were to get property while the money was to go to Mary Nevens and thence to the defendant via gift certificates drafted by the defendant—also signed on the same day! (Vol. 37, pp. 67, 83, 88-89). Highly interesting in this connection and, incidentally, contrary to the position now taken by the defendant, is the defendant's own testimony at the trial that the trade was still on until "the check came for around thirty-six thousand some dollars." (Vol. 36, p. 122.) This was the second check and it was for \$36,143.25. It was also later, being a *January 7, 1959, check* (Ex. 2139, F. 213; Vol. 9, pp. 164-165).

Everything else aside, the fact remains that the defendant has never explained how an alleged loan that was never mentioned at the trial by either himself or Mrs. Doan, both of whom would have been acutely familiar with the existence of any such loan, qualifies as newly discovered evidence.

*Swan Drive-In Theatre* (Defs. Br. p. 9). This is another transaction that was thoroughly ventilated at the trial. It is also another transaction in which the defendant has sought to escape the consequences of his acts by utilizing Charles Slaney who had been previously convicted of a criminal charge (7/16/63 Tr. p. 1114) and was again convicted on February 2, 1965, on ten counts of Grand Larceny by means of "trick, device, and bunco and by false and fraudulent



representations,” and sentenced to not more than fifteen years on each count, to run concurrently. (Certified Copy of Information, Judgment, and Sentence, S. R. 51-58). After failing to call Slaney as a witness at the trial, while admitting that he knew during the trial that Slaney had what the defendant categorized as “pertinent information”, but that he did not call Slaney as a witness because it was his belief that if the Government failed to call Slaney the issue would be decided in his favor (4/21/64 Tr. pp. 2649-2650, *Shibley v. United States*, 237 F. 2d 327, 332 (C.A. 9th)), certiorari denied, 352 U.S. 873; after failing to even claim, until after the trial was over (*ibid*), that the \$5,000 deposit in question was Slaney money invested in the Swan Drive-In Theatre; after testifying at the trial that another \$2,500 represented the total Slaney investment in the Swan Drive-In Theatre (Lenske, 7/16/63 Tr. 1115-1116); after testifying on the same day (7/16/63 Tr. 1148-1489) that he didn’t know what it related to when shown the May 1, 1958 deposit slip for the \$5,000 on which the notation was typed “\$5,000 on Charles W. Slaney in exchange for cash” and to which notation the defendant had added in writing, “Re Investments”—the identical language the defendant used, incidentally, on the \$500 check he gave Mary Nevens on the same morning Mrs. Nevens failed to respond to a subpoena (Vol. 12, pp. 8, 21, 48-56, 84-85); and after failing to present this claim following an adjournment granted at the conclusion of the trial at the request of the defense for additional time to seek new evidence, the defendant would now

have this Court label as newly discovered evidence the interestingly and carefully phrased affidavit of one Larson. As Larson put it (S.R. 23) the facts alleged in his affidavit were given to him by "Charles Slaney and Reuben Lenske," supplemented by a personal investigation of undesignated "surrounding circumstances" and unspecified "direct knowledge".

The Larson affidavit should be contrasted with Larson's testimony at the first trial where he was subpoenaed by the Government and testified that (1) he "only knew by reputation" who was supposed "to have purchased the Swan Drive-In Theatre, (2) that he had "nothing whatever to do" with the details of the purchase of the theatre, and (3) that he did not know who the purchasers were except that he thought he knew from what the defendant, "told me at that time" (Vol. 16 p. 67). As in similar instances, the defendant did not call Mr. Larson as a witness at the second trial, e.g., the affidavit of one Bennett (S.R. 19) who also testified at the first trial (Vol. 22, p. 120-122) and was neither examined by the defendant (Vol. 22, p. 122) on the \$2,500 Cimmaron Insurance Co. check, (the disposition of which by the defendant is discussed in the Government's Brief in No. 19,539 at page 70) nor called by the defendant as a witness at the second trial.

*Other Items Listed by the defendant.* On the L. W. Taylor transaction (Defs. Br. p. 67) which was reflected on the Government Net Worth Statement introduced into evidence at the first trial on March 30, 1963 (Vol. 27 p. 62) and never under attack by the defendant at either trial, the defendant would classify

as newly discovered evidence matter which was known to the defendant in 1958 (S.R. 58C) and was at that time and continued to be a matter of public record (S.R. 58k, 58m-58n), *Fernandez v. United States*, 329 F. 2d. 899, 904 (C.A. 9th), certiorari denied 379 U. S. 832, *Thompson v. United States*, 188 F. 2d 652, 653 (C.A., D.C.). In the same category is the Aremel transaction (Defs. Br. p. 66) in support of which the defendant relies on the affidavit of one David Raffety who was not called as a witness by the defendant at the trial and whose affidavit states that he lived all of his life "in a suburb immediately contiguous to Portland" . . . "and that all times during the past five years I have been available for interviews." (S.R. 41). So also, the defendant's effort to impeach the testimony of one W. K. Royal (Defs. Br. 71) while of no significance as newly discovered evidence (*Gallegos v. United States*, 295 F. 2d. 879, 881 (C.A. 9th), certiorari denied, 368 U. S. 988), and hardly an answer to the overwhelming evidence on this transaction (Gov. Br., No. 19,539 pp. 56-58), is of interest because the defendant contends that Royal gave conflicting testimony when he was examined by the defendant in a state court proceeding on July 29, 1963 (S. R. 33). But this was well prior to the last session of the trial below which did not start until August 15, 1963—and the defendant did not call Royal as a witness. The A. L. Prater transaction (Defs. Br. p. 64) is also another transaction that was reflected on the Government Net Worth Statement admitted at the first trial (Vol. 27 p. 62) and never under attack at either trial. A. L. Prater testified at

the first trial (Vol. 7 pp. 12-47, 83-89), as did Mrs. Prater (ibid 47-81), where both were examined at length by the defendant, and neither mentioned a running account owed to them by the defendant which, if they had, would have been incredible in the light of their testimony. Neither was called as a witness at the second trial by the defendant.

This is the record on which the defendant would now have this Court hold that the Court below abused its discretion when it denied the defendant's motion for a new trial on the grounds of newly discovered evidence.

### CONCLUSION

After over ten weeks of trial and in excess of three hundred and fifty witnesses, the defendant was convicted on the overwhelming evidence of his guilt. The defendant presented no newly discovered evidence in this, his second bid for a new trial, and it is respectfully submitted that the trial judge properly exercised his discretion in denying the defendant's motion for a new trial, and the order below should stand.

RICHARD M. ROBERTS,  
*Acting Assistant Attorney General.*

JOSEPH M. HOWARD,  
CHARLES J. ALEXANDER,  
*Attorneys,*  
*Department of Justice,*  
*Washington, D. C. 20530.*

## CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Date: ..... day of ....., 1966.

-----  
CHARLES J. ALEXANDER  
Attorney for the United States

No. 20448

FEB 14 1967

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REUBEN G. LENSKE, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

---

APPELLANT'S REPLY BRIEF

---

from

ORDERS OF

THE UNITED STATES DISTRICT COURT

for the

DISTRICT OF OREGON

---

Reuben G. Lenske  
Attorney pro se  
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Portland, Oregon

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FEB 14 1967  
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## ABBREVIATIONS

My Opening Brief in this proceeding is Op br  
The Government's Answering Brief in this proceeding is Ans br  
The Clerk's record in this proceeding is CR  
When I designate any reference to the main case I add 19539  
I numbered the Judge Carter trial phase reporter's volumes  
in consecutive, chronological order, up to 59 in 19539  
and I give the date as well as Volume number.  
The August 13, 1965 hearing on motion for new trial is  
numbered Vol. 60.





APPELLANT'S REPLY BRIEF

RE

ORDERS ENTERED AUGUST 13, 1965

DENYING PREJUDICE AND MOTION FOR NEW TRIAL

Specification of Error 1

Bias and Prejudice

Opening Brief 7 - 12

Affidavit - CR 61-80

Answering Brief 3 - 6

The law is clear that an affidavit of prejudice must be taken as true by the court and the court so announced from the bench: 8/13/65 Vol. 60, page 2:

"As I understand the law, the Judge cannot, against the evidence, pass on the veracity of the charges made. He may, however, pass upon the legal sufficiency of the motion."

In its first paragraph (Ans Br 3), the Government disputes the facts, while not denying the law. I accept the above statement of the law.

In the bottom paragraph on page 3 the prosecution alludes to the net worth the court found for me and the fact that I did not file an affidavit of indigency. In my motion to proceed with the existing transcript on file in this court in 19539 I set forth that the Government had tied up substantially all of my equities, which meant substantially all of my assets and that I was beseeched with lawsuits and foreclosures that I could not meet.

I expect not to be a pauper because I expect to prevail both in the criminal case and the civil case. In the meantime the Government has me tied up financially and has refused to release its liens on any of the properties liened by it. The prosecution is well aware of my financial status and should not flaunt 1958 figures or my unwillingness to be designated a pauper.

The prosecution refers on page 4 to my "efforts to use the clerk's copy of the transcript without paying reporter's charges." My affidavit of September 17, 1964, on file in the court in support of my motion of that date states that I paid the reporters about \$4000 for my transcript and that they have not requested any additional money from me. My affidavit (C) says that what the trial judge contends for would entail an additional \$2500 which I was unable to pay.

JUDGE CARTER ACTED AS AN ADVOCATE OUTSIDE OF HIS JUDICIAL CAPACITY IN THE CIRCUIT COURT AGAINST ME.

My first point (Op br 62/64) sets forth the conduct of Judge Carter in keeping possession of 18 volumes of the transcript in violation of Sec. 28 USCA, Sec. 753, which requires them delivered to the clerk. This is a mandatory requirement and as binding on the Court as it is on the reporter. Had this been an oversight it would be excusable and not a basis for prejudice but in the light of the succeeding paragraphs on page 62 such retention would show prejudice, even though Judge Carter might be construed to be acting in a judicial capacity after the appeal in retaining the transcripts.

In writing the letters to the District Court Clerk and to the Clerk of the Court of Appeals, Judge Carter was not acting in a judicial capacity. Here he is acting as an advocate against me and for his reporter, although, as I set forth in my affidavit, no request for money came to me from any of the reporters as a condition to filing the certified copy in the District Court or for its use in the Court of Appeals. Clearly the failure to file in the District Court is a violation of 28 USC Sec. 753.

If Judge Carter was acting in a judicial capacity in holding the 18 transcripts of proceedings that occurred before him he should have ruled on my motion filed in September, 1964.

In the letter to the District Court Clerk of October 2, 1964 (Cr 77) Judge Carter acknowledges possession of the transcripts and states that he is forwarding the first 40 volumes to the Court of Appeals and retaining the succeeding 18 volumes until he hears further in the matter. In his letter of the same date to the Clerk of the Circuit Court (CR 78) he cites a civil case as authority to require me to pay money to enable the Circuit Court to use the transcript originally filed in the District Court. I believe this would be a violation of due process but the gravamen of Judge Carter's action is enhanced in his admonishing the Circuit Court Clerk not to file or make a part of his records, the 40 volumes sent him. Judge Carter has no jurisdiction over the Circuit Court Clerk and that letter constitutes an intervention against me or my interest, and on behalf of someone

close to him, i.e., his reporter, in a matter of financial interest to his reporter.

In his letter of October 15, 1964 (CR 80) Judge Carter advocacy against me and for his reporter heightens. In that letter he cites two cases, whereas originally he cited one, in effect, confirms his advocacy when he says:

"I understand that Lenske is making application to the Circuit for the use of the clerk's copy. I accordingly request that a copy of this letter be handed to each of the judges on the panel."

Here Judge Carter, although acting as an advocate against me and for his reporter, places the full weight of his judicial prestige before the Circuit Court of Appeals in the form of a letter including citations and reasons against my interest.

From this point on Judge Carter should no longer sit on any judicial issues involving me. From this point on personal bias does exist. From this point on I was justified legally in my belief that I could not have a fair hearing before him. Leaving aside the fact that Judge Carter sat on my motion for a new trial from February 15, 1964 for almost three months without apparently taking cognizance of it and then, after remand was until August 4, 1964 before setting it for hearing, could I do anything but believe that Judge Carter's advocacy of what I consider a penalty against me for exercising the right of appeal to the advantage of a person so close to him as his own reporter reduced my chances by 95% to prevail on the merits before him.

It is my belief that the demands of due process dict



the removal of Judge Carter from the hearing which could have freed me.

PREJUDICE AS DEMONSTRATED IN MY BRIEF, 19539, AND  
CONDONATION OF AGENTS' STEALING OF MY DOCUMENTS.

The reading of my brief in 19539 and the testimony of Albert Deschenes, George Nyman and Frances Slossar will fortify points 2 and 3, CR 63, which are referred to on page 4, Ans. br.

JUDGE CARTER'S RESENTMENT AT MY DESIRE TO ARGUE MY CASE.

This is set forth in CR 63-4 and Ans br 4-5. On February 28, 1964, after a full day's session in court, and a night session reaching to 9 P.M. (Vol. 57 2/28/64 2548) my co-counsel, Charles Burdell of Seattle, Washington said, "I don't feel I can properly argue it tonight at this time," and it would take at least three hours to argue the defense side and I would like to have a continuance until any date - Monday... when we are more equipped to do it." (Vol. 57 2/28/64 2549). The response was immediate, "THE COURT: Motion denied." And (Vol. 57 2/28/64 2550) "THE COURT: ... we will proceed with the argument." Mr. Burdell argued for a comparatively short time (Vol. 57 2/28/64 2552 - 2588 and then the following occurred: (Vol. 57 2/28/64 2588).  
MR. LENSKE: If it please the Court --  
THE COURT: I don't have to hear you. You have an attorney. I have been patient throughout this trial. I have let you talk and argue and in an ordinary case if you are represented by Counsel your Counsel does your talking.  
MR. LENSKE: If it please the Court, I didn't absolve myself as



co-counsel. Two-thirds of the trial I did entirely myself as Counsel and as to that portion of it, I, alone, can argue relating to it.

THE COURT: (Vol.57 2/28/64 2589) I don't propose to hear argument from you, and I don't think it is particularly seeing you to be arguing on the question of your own alleged fraudulent intent to evade taxes.

MR. LENSKE: I do want to argue the case to the best of my ability including intent and including my motion to acquit...

THE COURT: (Vol.57 2/28/64 2591) I will give you thirty minutes. This was, as the prosecution states on page 5 of its brief, approximately 11:00 P.M.

An unprejudiced judge would have wanted to hear me first and would have set a time other than 11P.M. and would have been aware that I had tried two-thirds of the case myself. Further, it was not unseemly for Clarence Darrow to try his own case as co-counsel and to present argument to a jury himself. Leaving aside the matter of competence, certainly it is neither "unethical" nor wrong for a person to present argument on all phases of a case. And again in April:

MR. BURDELL: (Vol.59 4/22/64 2846) The point is that Lenske has, all the way through this trial from the very beginning up to the present time, been acting to a substantial degree as his own attorney.

THE COURT: (Vol. 59 4/22/64 2843) ...And the Court grants the motion for a new trial.

MR. LENSKE: May it please the Court, I have not come

my statement on the motion for a new trial.

THE COURT: Do you want to say something in your behalf before you are sentenced? We are adjourning at 12:00 o'clock.

: Yes, Judge Carter threatened to deny me a pre-sentence statement.

THE COURT: It is now twenty-five minutes to 12:00. ...Now if you want to take time now to talk about these matters, you may. Otherwise, I would rather hear you on what you would have to say as to the matter of sentence.

Also, the motion for admission of exhibits, which was filed April 15, is denied. I think I heretofore ruled on that -- refused to consider them.

THE COURT: (Vol. 59 4/22/64 2847) ...You may have twenty minutes. You may have until 12:15, if you want. You may have thirty minutes if you can divide it with Mr. Burdell..

JUDGE CARTER LISTENED AVIDLY TO THE OBYE-DURKIN ADJUSTMENT ISSUE SO LONG AS IT APPEARED THAT IT MIGHT BE ADVERSE TO ME. WHEN IT APPEARED THAT A MAJOR ITEM INVOLVED MIGHT BE FAVORABLE TO MY NET WORTH JUDGE CARTER STRUCK THE EVIDENCE.

References - CR 70-71, Ans. br. 506

Appellan's Opening Brief, 19539  
Ex 3020, 3021, 3022, 3023, 3024  
Ex Z-3, R-3  
CR 732, 791, 19539  
8/15/63 Vol. 51 1700-1725  
8/16/63 Vol. 52 1876-1901

In December, 1953 a deed (Ex Z-3, Vol. 52, 8/16/63, 18) was executed to me for an undivided half interest in the interest of Maxine Durkin in two parcels of real property. The appraised value and the market value of one piece, designated as the Union Avenue property, which was income bearing, was \$50,000. The value of the portion conveyed to me was \$12,500. (R-3) The income from this property (Vol. 51, 8/15/63, 1702) was collected by me in 1958 and was disbursed in January, 1959 as follows: one-half to the Shriner's Hospital for Crippled Children, the owner of a half interest, one quarter to Maxine Durkin and one quarter to Ira Spiegel and Spiegel, my then law partnership. I was subjected to considerable cross-examination and my file on the matter was marked as an exhibit and was examined by the prosecution during the noon recess.

When it appeared that some suspicion might be cast upon me on account of an apparent erasure on a deed the court was very interested in the whole transaction and it was gone into very thoroughly. However, when it appeared that the apparent erasure had no significance and it also appeared that the conveyance of the Union Avenue property was to myself personally and was in 1958 and that there was nothing untoward whatsoever in my relation to the transaction, Judge Carter struck all the evidence except the item relating to the income of \$837.59 from the property which he later allowed me as a proper deduction from 1958 income because of my liability for that amount as trust monies payable to the distributees, including the Lenske, Spiegel & Spiegel.

partnership for the one fourth portion.

It did not dawn on me until later why the Prosecutor, Mr. Alexander, was willing to concede to the striking of the testimony and why Judge Carter chose to strike it on his own motion

Since the conveyance was to me in 1953 and since the sale of the property in 1958 showed on our partnership records as a sale by the partnership for \$12,500 and since the beginning net worth period was December 31, 1954, I had a beginning net worth on that date of an additional \$12,500, which was distributed in 1958 to my partnership, and I was therefore entitled to a deduction of \$12,500 from my 1958 net worth plus depreciation allowance for the intervening years. This did not dawn on me till later and when I tried to revive the transaction, Judge Carter refused to consider it.

Note - I made another mistake. In my motion (CR 791) and my brief, 19539, 43, I claimed only two thirds of the \$12,500 or \$8,333.33. This was error. My third was already accounted for in the partnership income and, therefore, the whole \$12,500 was properly deductible from my 1958 net worth.

Why, except for prejudice, would the court permit hammer and tongs after me when there was suspicion of wrongdoing or objection to my being allowed the \$837.59 reduction, and then the hurried burial of the transaction when I should be allowed a reduction of sufficient to knock out 1958?

Following are pertinent excerpts from the record.

Vol. 52,8/16/63, 1894.



MR. ALEXANDER: We will bring out that the Union Avenue property, when they collected this fee in 1958, was recorded fee on the partnership books and records, and the entry is record fee, Union Avenue property. That is the only property was reported by the partnership and the only property that ever reported as income...And I don't know what this piece is that is dated 1953.

THE COURT: (page 1895) You (to Alexander) spoke of as a piece of paper.

MR. ALEXANDER: Which is that?

THE COURT: Exhibit Z-3 (2), the unacknowledged deed No. (2) is the affidavit. Z-3 (1) is the deed of December. This was in the possession of the defendant.

THE COURT: Obviously, it was delivered, whether acknowledged or not, and it conveys title.

THE COURT: It conveys title. The recording statute have to deal with bona fide purchasers for value.

THE COURT: (page 1897) And the signature on (2) could and a layman could see it is the same signature as appears, which the witness says is now in the possession of the title company and could be obtained...

MR. ALEXANDER: (page 1898) ...We are going to develop testimony ...that the entry for this whole transaction of Durkin estate in the partnership books is in 1958, when they collected the fee, and it was reported as taxable income in that year and correctly so.

MR. ALEXANDER: May I take the defendant's file, your honor, and examine it during the noon recess?

THE COURT: Yes, it is marked for identification...

After the noon recess the following occurred 8/16/68

Vol. 52, 1900-1

1:30 o'clock p.m.

THE COURT: Defendant present with his counsel.

Gentlemen, I have given some consideration to this matter that you have been going into at length. This case was opened up for this further hearing solely for the purpose of considering these adjustments which were submitted through Mr. Marx to the Government and a copy to me, and relying upon that understanding I struck out of the records some testimony Mr. Alexander offered about a certain document and this morning I refused to hear Mr. Hawkins, which pertained to some other issue on a matter on which I have already made findings.

We come down now to an adjustment in the Obye Estate which involves, as far as rental is concerned, some \$837. That I will consider -- without indicating what I think about the merits of the adjustment.

But the matter you are now going into will not affect the rental adjustment and would, if it affects the case at all, amount to some adjustment proposed by the Government that would not vary the rent situation, but would pertain to net worth as another type of adjustment.

Although they say it is pretty hard to unring a bell, that is what I propose to do. I propose to set aside my order admitting into evidence Exhibits 3021, 3022, 3033, 3034, and Z-3 (1); to strike the testimony of Mr. Lenske insofar as it involves these



exhibits that had been stricken; and not to admit into evidence Exhibit Z-3 (2), Z-3 (3).

Is the record clear now as to what I am doing?

MR. ALEXANDER: Yes, Your Honor, that reflects the action of counsel -- I am sorry, it reflects the Court's ruling on this matter.

THE COURT: What is that?

MR. BURDELL: As I understand it, what the Court said properly reflects the Court's view on it.

Please note that the Government says (CR 791) that "The testimony was stricken by the Court following the agreement of counsel." Mr. Alexander did agree to it as per his statement above, but I did not permit my counsel to agree to it and the accounts for the colloquy quoted above from page 1901, Vol. 8/16/63.

Please note further that the Government does not see fit to present any meritorious basis for rejection of this item in my net worth. It could have, as an alternative to its cross defense to this item, argued the merits but it did not. As in most all of its defenses to my motion for new trial the Government has resorted to technical defenses and has ignored the merits. The same is true of numerous other items, such as the Norman item, which would have eliminated 1957 and/or 1958. (Br 19539, page 61) The Government did not contend that I ever got a penny back from the money I invested in or with the Wilson family, totalling in the amount of \$15,000; I ask the Court to look at the substance and grant

me justice on the merits.

NO KNOWING OR AUTHORIZED CONCESSION

On February 28, 1964, Vol. 55, 2435, the following occurred:

THE COURT: Before we take up the W-3 series, let's just run through the record. No. 1 is in dispute; 2, 3 and 4 are conceded and have no effect upon the Exhibits 3030 to 3033 and have already taken them into account. Is that right?

MR. ALEXANDER: That is correct, your Honor.

THE COURT: Is that right?

MR. MARX: Yes, sir.

I had never authorized Mr. Marx to make any concessions on my behalf and I did not know what they were talking about. The concessions appeared to be concessions by the Government since Exhibits 3030 to 3033 "have already taken them into account."

I have gone into this Obye-Durkin item at length because I believe that at some time the court's prejudice got the best of him and closed his mind or eyes to this important item and, therefore, my affidavit of prejudice was well founded on it.

But that is not the only reason I have gone into it at length. To avoid duplication I ascribe this portion of the brief to cover the Obye-Durkin item for my reply brief in 19539. It is the second item on page 3 of the subject index and on page 43 of that brief. I further ask the court to read the transcripts covering that item and the motion on CR 732 and CR 791 and then reverse Count III, the year 1958, on account of plain and obvious error regardless of any technicalities. Not until I wrote this brief did I realize the full effect of this item.

I was mistaken in my motion, CR 732 and my brief in 19539 in asking for an adjustment of \$8333.33, which is two of \$12,500. The whole \$12,500 was accounted for in our partnership return for 1958 and already is reflected in my 1958 income. Therefore, the whole \$12,500 should be deducted from my 1958 net worth. However, if it were calculated that I only had a third interest in 1953 when I got the deed, then one third of the \$12,500 should be deducted from 1958 income, or \$4,166.67, almost half of the amount necessary to wipe out 1958 after crediting me with the amount of tax paid that year. But I firmly believe that I am entitled to the whole \$12,500.

There is another reason why this reduction should be allowed me. Under the doctrine of the Holland case, where the Government has a lead and has not followed it up, at the least the item should be conceded to reduce the taxpayer's net worth. There were ample leads in the partnership books leading to the Obye estate file, and other court records showing when the partnership agreement was made for division of the estate in 1953 which resulted in the deed from the Durkins to me.

I ask the court to read the testimony on this item and how prejudicial and erroneous it was for the court to strike the evidence when it had reached the trail of a major reduction in my net worth for a crucial year, the only year in which it was necessary to reduce income by more than \$4000 to eliminate a deficiency.

THE GOVERNMENT AND THE COURT BASED  
THEIR CONCLUSION ON THE BERTRAND ITEM ON  
"NO EVIDENCE" AND UNWARRANTED JUDICIAL  
DESTRUCTION OF INCONTROVERTIBLE EVIDENCE.

The Government bases its whole case on the \$3911.12 Bertrand check on the "no evidence" doctrine. That I received the money is conclusive. The check is in evidence, its deposit in my account is in evidence. (S-1) Mrs. Bertrand testified that she gave it to me, I testified that I received it. The Government seems to think it made out its case against me by showing that the \$3911.12 receipt does not appear on my black ledger book and that it has not found a descriptive memorandum in S-1 along with the deposit slip showing the deposit in my bank account. By the same token there is no slip showing this was an attorney fee deposit and no entry in my book or the partnership books showing that this was a fee. I invite the Government to file with the Court any refuting evidence to the foregoing.

Thus the Government bases its conviction of me on "no evidence", i.e. because somehow an office girl failed to make an entry in a book showing the receipt of a substantial sum of money. Does that mean that I didn't receive the money? Does that mean that the cancelled check and the deposit of the money in my bank account are not conclusive evidence that I did receive the money?



Since the ledgers and the deposit slips do not show that sum of \$3911.12 paid me covers there simply is no book evidence on those scores to show the consideration for that. But we have two witnesses, Eleanor Bertrand and myself, along with the original statement and my copy of the statement and Eleanor Bertrand's check stub. As to the possibility of it being an attorney fee, there is not the slightest evidence that I performed services of that value, that I ever asked her for that amount of money for fees or that I made a statement to her for such fees or any other fees or that she paid me that check in the amount of \$3911.12 for fees.

The Government's case is based upon "no evidence". My case is based on concrete, irrefuted evidence. The unrepaid advances to me, evidenced by checks, material purchases, advancements to labor and our sworn statements to the judge and jury in open court that the \$3911.12 check was given to me in repayment of advances. No unprejudiced judge can constitutionally, by the use of "no evidence" and the destruction of clear affirmative evidence, convict a man of a crime as Judge Carter did to me on Count II for 1957. He did that in the face of the four cardinal principles of law that:

1. A scintilla of evidence is insufficient to prove a fact.
2. Proof of a fact must be supported by substantial evidence.

3. The Government has the burden of proof.

4. The Government must prove every phase of its case beyond a reasonable doubt.

In view of the fact that an important feature of this case is the constitutional issues, i.e., due process and unlawful search and seizure, and the issue of due process includes the issue of Government prepared false statements and Government sponsored false testimony, it is the duty of the appellate court to examine carefully the evidence in this case, on the facts, (involving due process and this is one of them) and to form its independent conclusion on the facts.



THE TWENTY-FIVE HUNDRED DOLLAR BERTRAND  
MORTGAGE TO ME AND THE EVENTS THAT FOLLOWED  
IT ALSO PROVE THE RIDICULOUSNESS OF THE  
COURT'S FINDING.

The prosecution makes a point of the fact THAT Eleanor Bertrand is a widow and that I have a mortgage on her home (Ans. br. 20448, 23.) What an amazingly distorted view of evidence! The mortgage given to me on her home is a third mortgage, given in December, 1958. It is non-interest bearing and at the time Eleanor Bertrand testified not one penny had been paid on it.

The court's finding was that in December, 1958 she owed me about \$5400. almost \$3000 more than the amount of the mortgage. Here again is Government and Court manufactured evidence. I took the security for my benefit and she owed me \$5400, is it reasonable that the mortgage would be for that amount? I took it for protection for her, so that she would better insure her exemption rights in case of bankruptcy or execution sale, wouldn't it have been foolish to execute a mortgage for \$2500 if there were \$5400 owing? Here again, as in so many other phases of the case, the findings are based on no evidence or contrary to evidence.

Evidence of succeeding events proved conclusively that the mortgage was for future legal services and that the sum

\$2500 was as large a sum as I felt I could sustain in case of litigation over it and that it was for the protection of Eleanor Bertrand.

Her bankruptcy schedules (CR 106,109, 20448) show only \$2500 indebtedness to me and the consideration to be legal services. The evidence further shows that the services anticipated at the time of execution materialized accordingly. She was sued for over \$10,000 and upon trial judgment was rendered against her. With the three mortgages against her home, the homestead exemption, a very limited exemption in Oregon, now \$7500, then only \$5000, was allowed, and she retained her home. What was there to counteract all this evidence? "No evidence."

ELEANOR BERTRAND - ONE OF THE MANY REASONS WHY I DID NOT CALL CHARACTER WITNESSES.

I would like the court to judge me as a person, a lawyer, a lender on the basis of my treatment of the Bertrand family. This is an example of why I did not call character witnesses. If I mistreated that family, if I hadn't kept my word with them, if I overreached them (collecting \$3911.12 in fees from them would have been overreaching them and would never have resulted in Eleanor Bertrand's writing Ex G-3, (CR-9), the letter of April 9, 1961, without my knowledge to Deschenes when he inquired about her relationship to me), if I had charged them excessive interest for the loans (I charged none), then I would have needed character witnesses.

But it was obvious to me that my best character witnesses were the people I dealt with, the people I represented, and the Government called 347 of them and <sup>they,</sup> I am proud to say, with the exception of a handful, including Eleanor Bertrand, weathered the feat of Government pressure, and attested to my fair dealing with them.

I have gone to considerable length to make my point but I burn when the Government makes another point on no evidence. My mortgage was no cause for concern of Eleanor Bertrand, a mortgage that was non-interest bearing and on which not a penny had been paid from 1958 to 1963. What the prosecution, bound by law to see that justice is done, failed to point out is that Eleanor Bertrand did have good cause to fear the Government, at least Albert Deschenes (CR 7).

Yes, I hope the court will judge me by the standard set in my treatment of the Bertrands. I hope the court will treat this case by that standard. The "no evidence" of the Government against the overwhelming evidence, documentary and live. I hope the appellate court will see the real pattern of the case when it puts together the false, Government prepared Eleanor Bertrand and Rebecca Tarlow affidavits and the Government sponsored false testimony of Mary Jane Garson, W. K. Royal and Madelyn Cox, and the jail threats against Jake Preuit and Melvin Davis.

April 9, 1961

Internal Revenue Service  
P.O. Box 5341  
Portland, Oregon

Attention: Mr. Albert Deschenes, Special Agent

Gentlemen:

In accordance with your telephoned request to me a few days ago, I write this letter to state that all business matters were handled by my husband in years past and Mr. Lenske was his attorney, helping him considerably in legal matters and also advancing money on many occasions for equipment and to build. To the best of my knowledge these loans were repaid.

The mortgage I gave Mr. Lenske was at a time when my husband's whereabouts were unknown, I was being threatened with lawsuits, and I needed to protect my equity in our home. It was understood that the mortgage would stand for any services he might render for me in the future also and while he has done considerable work for me, I have never received a bill from him. I therefore don't know how much I owe him at this time but hope to start taking care of this either this year or next.

I am a widow with two children and Mr. Lenske has helped me immeasurably, thus far without remuneration. I trust this answers your inquiry.

Sincerely,

Mrs. Eleanor W. Bertrand

P.O. Box 225  
Astoria, Oregon



Government Sponsored False Testimony

Madelyn C (Pavia)(Ryland) Cox

References:

First testimony - 2/25/63, Vol. 4, pages 52-56

Second testimony - 3/27/63, Vol. 25, pages 3-22

CR 19539, pages 200-215

Ex 2034, receipt

Ex 195, folder 43, Contract of sale, Allens to Madelyn Pavia (Cox) for 6628 S.E. 43d

Ex L - letter of Nov. 12, 1953 by Madelyn Ryland (Cox) to Mr. and Mrs. Ralph Coates

Ex N - lease of said house, Madelyn Pavia (Cox) to Coates

Ex O - undated letter, Jackie (Madelyn) to Reuben Lenske

Ex P - letter by Madelyn Ryland (Cox) to Reuben Lenske

Ex Q for Identification - copy of letter dated January 20, 1954 to Madelyn Ryland (Cox) from Reuben Lenske

Ex R for Identification - copy of letter dated March 19, 1954 to Jackie Ryland from Reuben Lenske

Ex S for Identification - envelope to Reuben Lenske by Madelyn Ryland

Ex T for Identification - undated letter to Reuben Lenske postmarked December 3, 1953 from Madelyn (Cox)

Ex M - Loan security agreement, Joseph and Madelyn C. Ryland 3/27/63, Vol. 25, page 10

"Agreement. Joseph and Madelyn C. Ryland, husband and wife, have this date borrowed from Kenneth Armstrong the sum of \$500, and agreed to repay the same with six per cent interest in two installments, \$250 in 60 days from date the balance 60 days thereafter. As security, the Rylands hereby assign the contract of purchase of the property at 6628 S.E. 43rd Avenue, Portland, Oregon. Dated this 11th day of November, 1953. Signed Joseph R. Ryland, Madelyn Ryland

Note - Kenneth Armstrong is an investor for whom I had invested a total of up to \$30,000 on property. See 3//1/63 Vol. 8, pages 2-19.

Excerpts - Kenneth Armstrong Testimony

3/1/63 Vol. 8, pages 2-19

Q (By Alexander) ...state your name and address, sir?

A Kenneth A. Armstrong, 1902 G Street Northwest, Washington 6, D.C.

Q Are you familiar with the defendant Reuben Lenske, Mr. Armstrong?

A Yes. I have known Mr. Lenske, I think, over thirty years.

Q Have you had the occasion to invest moneys with Mr. Lenske?

A Yes.

Q In return for this money, sir, what did you receive from Mr. Lenske?

A I received this memorandum agreement from Mr. Lenske.

Q (page 4) Is that (Ex 2091)dated...March 23, 1947?

A Yes.

Q (page 5) This agreement provides, does it not, that you are investing moneys with Mr. Lenske in return for interest on your money; is that right, sir?

A Well, that is correct, in substance. I made him my investing agent.

Q (page 5 line 23) ...How much do you have invested at the present time, sir?

A \$30,000.

Q And over the years, (page 15) sir, you received a large number of mortgages which you held as security for your investment; is that right, sir?

A I received some mortgages and other legal papers.

A (To cross-examination, page 17, line 8) ... I was admitted to practice law in the State of Oregon on September 12, 1921 and ever since that time I have been and still am a member of the Oregon Bar in good standing... (line 12) I am employed as an adjudicator in the Adjudication Division, Veterans Benefit Office, Veterans Administration, Washington, D. C.



## Madelyn Cox False Testimony

Madelyn Cox, then Madelyn Pavia, purchased a house on contract in the year 1953 (Ex 195 f 43). Ten years later, 1963, two witnesses testified falsely about this property transaction, Madelyn (Pavia)(Ryland) Cox and W. K. Royal. Each of these Government witnesses testified as to oral admissions against me relating to the ownership of the vendee's interest in the property covered by that contract, oral admissions presumably made some nine or ten years previously. 2/25/63 Vol. 4, 52-56 and CR 20448, 33.

Madelyn Cox testified Vol. 4, 2/25/63, 55:

Q (By Alexander) Now, after you made the payments about three months, what did you do next, if anything, with respect to this property?

A I borrowed \$500 from Mr. Lenske.

\* Q Well, when you borrowed the \$500, did you continue  
\* to make the payments on the contract after that?  
\*

\* A No, because he told me it was his house then, that)  
\* I signed the house over to him. ) EL

Q And did you leave the city at that time?

A Yes, I did. I went to San Francisco.

Madelyn Ryland and her then husband borrowed the money and assigned the contract on November 11, 1953 (Vol. 25, 3/27/63, 10). In the following month, December, 1953, Madelyn Ryland (Cox) wrote me (CR 204, 19539):

"I would like to sell that house..."

After I served copies of this letter and other correspondence between herself and myself on the prosecution and after she was again interviewed by them and was recalled for further cross-

examination (CR 200-215, 19539 and Vol. 25, 3/27/63, 3-22)

I confronted her with her testimony of 2/25/63, Vol. 4, 44:

Q (By Alexander) Well, when you borrowed the \$500, did you continue to make the payments on the contract after that?

A No, because he told me it was his house then, that I signed the house over to him.

Then I asked a question and received the following answer to it:

Q ... Is that statement true? Did I tell you it was my house then? (3/27/63, Vol. 25 page 9)

A No, you didn't say it in those words, Mr. Lenske. When I didn't pay you the \$500, it was your house. You said you never wanted it, but I never owned it, so I don't know who had it.

We now have the truth from her, i.e., that I didn't tell her that the house was mine and that I said that I never wanted it. But at this second session she lied again. She said (Vol. 25, 3/27/63, 6):

A When I asked you if I still owned that house in one of your letters that you had photographed, you never gave me a definite answer...

She admitted that this communication was in writing.

Q Now, is this statement you made based upon written letters between yourself and myself?

A That is right.

Q It wasn't based upon conversations between us?

A No, because I never talked to you.

In answer to her December, 1953 letter I wrote her on December 12, 1953 (CR 209, 19539) as follows:

I have your recent letter. I shall try to get a buyer for you for the amount that you want, but I cannot promise that this can be done.

Again I wrote her on January 20, 1954: (CR 210, 19539)

As I told you before I do not need nor care for the house myself although I have made the advances for you to help you retain it, as well as to protect the loan that I made for you... I will let the money I lent

you ride for the time being so that you can keep your equity in the property.... I am glad to note that you are both employed and I am sure that if you are conservative in your method of living you will be able to keep the equity in the house.

Again I wrote her on March 12, 1964 (CR 212, 19539):

I told you originally and also wrote to you that I do not want the house.

This correspondence dispels Madelyn Cox's first false statement, that I told her the house was mine when she signed the loan agreement and assignment, and her second false statement that I did not give her a definite answer in the correspondence.

#### Poor Memory or False Memory?

I asked Madelyn Cox some other questions (Vol. 4, 2/25/63):

Q Did I draw up a lease for you after you married Joe and between yourself and the new tenant?

A What kind of a lease?

Q A lease on the house.

A If you did I have never seen it...

At the second examination, Vol. 25, 3/27/63, 13, I confronted her with these answers she had given the first time:

Q Did you make those answers?

A Yes, and I still maintain them. I can't remember that long ago, Mr. Lenske.

When I confronted her with the lease (Ex N) and said:

Q ... and ask you to please examine this instrument and see if that is your signature on it?

A Yes, it is.

I later asked her (Vol. 25, 3/27/63, page 16):

Q Were you shown this very lease, a photostatic copy of this lease, by Mr. Alexander or one of his aides this morning?

A Yes.

Madelyn Cox did not hesitate to remember, falsely, the statement that I told her the house was mine when she borrowed \$500 and assigned the contract of purchase. She did not hesitate to remember (again falsely) that I never gave her a definite answer in my letter as to ownership of the house. Yet when the chips were down on cross examination she said, Vol.25,3/27/63,13:

A ... I can't remember that long ago, Mr. Lenske.

Previously on cross examination she had said (Vol. 4, 2/25/63, 60):

A (line 5) No, I can't remember.

And again, on line 10:

A ... Like I said, it has been ten years.

And on page 57, same date and volume:

A No, I really don't, it has been too long ago.

#### Memory, Falsity, Hostility

Referring to a conversation I had with her on February 4, 1963, on which I interrogated her (Vol. 4, 2/25/63, 60-64) Madelyn Cox said (page 64, line 7):

Mr. Lenske, I am going to be honest with you. The morning you and I talked I hadn't slept in about 30 hours, and you could have been talking all morning, and I wouldn't have understood what you were saying, and I still don't.

The Madelyn Pavia Cox property in itself is not a major item on the net worth attributed to me by Albert Deschenes in his net worth statement and in the court's finding that adopted it (CR 1110, 19539, F 43), also CR 1132, i.e., that one item will not be determinative of a deficiency issue. But symbolically it could be determinative of my case. For that reason I have gone to the pains of analyzing this woman's testimony with some degree of care.

Now, why the good memory for falsities to my detriment, admitted poor memory otherwise and unjustified hostility towards



me when the evidence (see the references on the firstpage of this item) shows I did nothing but good for her? She had nothing to gain<sup>by</sup>/her false testimony against me. The answer is that her testimony does not stand alone, the pattern of her false testimony is threaded throughout the jury trial and becomes clear when it is coupled with the false testimony of W. K. Royal which will follow this item and with the false affidavit prepared by Albert Deschenes for Rebecca Tarlow, the false affidavit prepared for Eleanor Bertrand, the very similar false testimony of Mary Jane Garson, the unconstitutional practices of the Internal Revenue Service against me and the additional ones undertaken by the prosecution. Some of the threads of such evidence are thick, many colored and clear, some are subtle and must be viewed through the spectre of the more obvious misdeeds of the Government before, during and after the judgment in this case.

This item is important because it is one of the very few items of property attributed<sup>to me</sup>/on which I was examined at the trial and therefore it acted as a viewfinder through which the Court saw numerous other parcels of property attributed to me to which I had no title and as to which there was no evidence of my ownership. I shall treat this further on in this brief, I discuss the testimony of W. K. Royal about this property..

W. K. Royal, a Portland lawyer, foreclosed the contract of sale of the vendors (Vol. 6, 2/22/63, 207) of the property purchased on contract by Madelyn Pavia Cox (Ex 195, Folder 43).

He testified very much like Madelyn Cox did, that some nine to ten years previously I had said that the contract had been assigned to me (Vol. 6, 2/22/63, 203):

"and I then got in touch with Mr. Lenske about it and tried to straighten it out, and at that time he told me that the property -- the contract had been assigned to him."

This scintilla of evidence against me was dispelled by my cross examination of Mr. Royal as I shall show when I go further into the ownership of that property. what I want to emphasize now is the falsity of Mr. Royal's testimony - and who sponsored it. On July 29, 1963, in the foreclosure suit in the State Court I examined Mr. Royal regarding this contract and here is the testimony (CR 33, 20448):

Q Well, then, Mr. Royal, you were never able to find out from me what, if any, interest I claimed in the property, is that correct?

A You told me that you had loaned Mrs. Pavia \$500, and that was all; that's all that I could get out of it.

Q Then as I understand your testimony, the only information that you received from me regarding any claim of any kind relating to the property, was that I had lent Madelyn Pavia \$500?

A I think that was the gist of the whole thing. I tried to pin you down and I couldn't get any response.

Q Do you mean I never told you that I was the owner of her equity in the property?

A You never mentioned that. You never told me that.

Q Do you mean to tell this Court now that I never told you that I was the owner of Madelyn Pavia's interest in the property?

A You never told me of any assignment to you.



There is no denial by the Government that the testimony of Mr. Royal in the State Court showed the falsity of his testimony against me in the U. S. District Court. The real question, therefore, is, how come the original false of an oral admission by me some nine to ten years earlier? How come a similar oral admission by me to Madelyn Cox, both of which were proved to be false by the later admissions under oath by Madelyn Cox and W. K. Royal? Some central force sponsored the two like false statements; the same force that sponsored false affidavits by Rebecca Tarlow and Eleanor [redacted] the same force that stole documents from me by the hundreds; the same force that extracted affidavits from other witnesses by threats as will be shown later in this brief. The proof of the pattern is evident in the Madelyn Cox and W. K. Royal similar but separate false testimony.

The prosecution does not deny the State Court testimony of W. K. Royal, which should effectively make false the W. K. Royal U. S. District Court testimony that I said the contract had been assigned to me; it merely says my point comes too late (Ans. Br. 30 ). I acknowledge that I should have brought this forth earlier but ask that in ~~in~~ the interest of the truth and justice the court accept the testimony as shown in CR 33, 20448. If the truth is otherwise let the prosecution refute it even though I served my affidavit on the Government on February 13, 1965, almost a year ago. (CR 20448)

Q Do you think that Mr. Franklin might have your file of correspondence with me?

A I called him this morning and he was out of the city, and I spoke to his secretary. She said they had nothing that old in their files at the office, but he might have that in his files at some other place where he keeps files, but I was not able to contact him.

And again she said (Vol. 4, 2/25/63, 196, line 21):

A ... It is possible that he (Franklin) still has it.

She also had testified before that (page 188, line 19):

A Well, then the real reason I don't have that letter, I sent everything up to a Mr. Wesley Franklin, an attorney who I knew before I left Portland...

There were two false steps in Mary Jane Garson's testimony. First must be shown the destruction of the correspondence, then the contents of the correspondence. Albert Deschenes knew that she had forwarded the matter to her attorney, Wesley Franklin, since she so advised him when she answered his letter of October 19, 1959 (Ex 2084, F 93). Moreover, she spoke to Government agents a number of times after that (Vol. 23, 3/25/63, 9-12).

Mary Jane Garson showed some contriteness (Vol. 4, 2/25/63, 195), "and I will apologize for my bad memory" and shortly thereafter, "And again I will apologize for my bad memory." Not so the prosecution. When I moved that her false testimony be stricken (CR 193) there was no concurrence by the Government, and this was after I found and produced and served upon it the correspondence that showed up the falsity in black and white. It is therefore evident that the two false steps were induced by the prosecution and we must add the Garson false testimony as one of the links in the chain of false testimony induced, sponsored and adduced by the prosecution.

Government Sponsored False Testimony

Property Involved and References:

Pierce property (2646 S.E. 122nd), Folder 93

First testimony - Vol. 4, 2/25/63, 182-198

Second testimony - Vol. 23, 3/25/63, 9-17

Motion to recall her for further examination - CR 193, 19539

Supporting correspondence - CR 193-198, 19539

Letter, Garson to Deschenes, Oct. 19, 1959 - Ex 2084, F 93.

Mary Jane Garson was called as a witness by Mr. Alexander and examined by him (Vol. 4, 2/25/63, 187):

Q You had no discussions in connection with this property or this mortgage with Mr. Lenske, then?

A No discussion, but I received a letter.

Q Do you have that letter with you?

A I don't have anything. I throw everything away.

Q What did Mr. Lenske say to you in that letter, if you remember?

A ... The letter said, stated that he purchased the property.

That she destroyed the letter (or letters) was false and that I wrote her that I had purchased the property was false. See Exhibit I and CR 196, 197, 198, 19539, the letters I wrote to her. The only letter referring to the purchase of the property, CR 198, said:

"My client is considering a trade of the property."

On the very morning she testified that she had destroyed the letter she called her attorney in Portland, Mr. Franklin

Government Prepared False Testimony

References

My brief, 20448, 68-80

Vol, 20, 3/21/63, 131-141

CR 20448, pages 5, 58a, 58g, 58H, 58I, 58J, 58O, 58P

Ap. Answer, CR 97-103

Ap. br. 20448, 21, 24

Ex 2358, F 226

CR 1109, 19539

In my opening brief, 20448 I said on page 70:

"I demand a specific answer to my challenge that the ending balances each year as prepared by Albert Deschenes is false and substantially incorrect."

The Government has refused to meet my challenge. There was no simple or even qualified "no" to my challenge (Ap. br., 20448, 23-25). The Government prosecutors have enough integrity and concern for their standing before this court so that they did not and will not state to this court that:

1. The figures compiled by Deschenes and
2. Accepted by Rebecca Tarlow when she was in the hospital and
3. Accepted in toto by the trial court,

are a correct statement of the annual ending liabilities. But while their self respect will not permit them to make the false statement that those figures are correct, their integrity is short of an admission that the figures are incorrect.

The Government is correct, however, when it states (Ap. br. 24):  
that at the trial:



"Mrs. Tarlow testified with respect to her affidavit (Ex 2358) reflecting the amounts owed to her by the defendant (Vol. 20, pp. 131-141): 'Yes, that is correct because we went through these very thoroughly at the time.'"

Mrs. Tarlow was led into that false testimony by Mr. Alexander as follows (Vol. 20, 3/21/63, 136-7):

Q Now, does that statement (Ex 2358, Deschenes-prepared affidavit) refresh your recollection as to the amounts you invested with Mr. Lenske?

A Yes.

Q At the end of 1956, did you have \$15,500 invested?

A Correct.

Q And at the end of 1958, you had \$28,500?

A Yes, that is right.

Rebecca Tarlow sued me in State Court and I took her deposition on June 25, 1964 and she then testified (CR 58-1

Q Did you prepare that (Ex 2358) yourself?

A No.

Q Who prepared it?

A I turned over all my material to Mr. Deschenes, as I said before. I think I mentioned that last time when you were here, and I gave him whatever I had and I said, "Here it is. This is everything I have invested and this is everything-- I think everything-- what I turned over to him, I gave him my mortgages, the letters pertaining to the mortgages. It was in a little bundle I turned over to him, and he got his record from it.

Q Did you examine that in detail before you signed it?

A No.

A No, he came to me when I was hospitalized afterwards and he said that he had an affidavit made as a result of the investigation when he was at my home, as I remember, in other words, maybe to that effect. I can't remember exactly what he said, and he would like to have me sign it and he would witness it, and he presented it to me and I looked it over ... as for the dates ... I paid no attention to that ... being in the

hospital and having no mortgages I didn't even look at them.

A ... he says he needs my signature on this. I believe he must have said that "this is the information I prepared from your material." He must have said that...

Q Did he have this affidavit all prepared when he came to see you?

A Yes.

Q These exhibits are mentioned in the memorandum -- as memoranda in your affidavit, and therefore were already known to Mr. Deschenes, were they not?

A Oh, yes, they were known to Mr. Deschenes.

IT SHOULD BE CLEAR, THEREFORE, THAT THE ENDING LIABILITY BALANCES ON THE PRECEDING PAGE, THOUGH COMING FROM THE MOUTH OF REBECCA TARLOW, EMANATED FROM THE MIND AND PEN OF ALBERT DESCHENES.

So much for how the false balances got into the original testimony of Rebecca Tarlow; now let us see a few specific illustrations of the falsity. Continuing my examination of Rebecca Tarlow on deposition on June 25, 1964, (CR 58-I):

Q ... and then in the year 1956 it (Ex 2358, the Deschenes-prepared affidavit) shows \$3,000. Did you invest only \$3000 with or through me in the year 1956?

A Let me see. In 1956? No, 1956 I turned over to you a check for \$3,000 and for \$5,000, in 1956 of March was \$3000 and July 13, was \$5,000.

Q (CR 58-H) The \$5000 that you gave me on July 13, 1956, was that repaid to you?

A No, you didn't pay me in 1956.

The foregoing testimony was fortified and corroborated by the \$3,000 and \$5000 cancelled checks (CR 58-0). What



effect does the new Rebecca Tarlow testimony have on my net worth for 1956? It simply decreases it by \$5000 and that decreases my income for 1956 by \$5000 and might, by carrying the loss forward, decrease my 1957 income. Let us now see the effect of this new evidence in specific figures for 1956.

The indictment alleged that I had an adjusted gross income of \$564.41 for 1956 (Count IV, CR 19539, 3). It further alleged that my return for 1956 showed a loss of \$9940.45. The court found that I had a loss for 1956 of \$9231.59 (CR 19539, 17). The additional decrease of \$5000 in my net worth, when added to the court's finding would result in a finding of a \$14,231.59 loss for 1956 or \$4291.14 greater loss than my return shows. I shall later dwell on the overall effect of this evidence. The Government has not denied the truth of this evidence and the \$3000 and \$5000 checks to me by Rebecca Tarlow appear in my bank deposits (S-1).

I continued my examination of Rebecca Tarlow on June 25 1964 that culminated in some additional figures (CR 58-H).

Q Then your present opinion is that as of December 31, 1958, you had outstanding, through me, a total amount of money coming to \$39,000?

A That's right, that's the way it seems. That is the way it seems.

Q I now again refer you to Deposition Exhibit No. 1. (Ex 1) Does that exhibit show the total amount you had invested with me as of December 31, 1958, was \$28,500?

A Yes, it says there. I don't know how it was arrived at. I think there is some conflict there because of the transfer of the checks from above, in 1959, of those mortgages.

I continued to examine Rebecca Tarlow:

Q ... (CR 58-1) then it is a fact that on December 31, 1958, you had invested with me \$39,000?

A Yes...

Q Now what you are saying, then, is the line on the first page of Exhibit No. 1, (Ex 2358, the Deschenes prepared affidavit from which Alexander read the figures to Rebecca Tarlow, Vol. 20, 3/21/63, 136-137, when she testified in the U. S. District Court) which shows that you invested with me \$12,500 in 1959, is incorrect?

A It really is...

Q Does that mean that \$10,500 of that \$12,500 was actually payable to you or had been actually invested by you with or through me before June, 1, 1959, or before January 1, 1959?

A Yes. Yes; yes, that is true; that is true.

Q How do you account for such a big error in Deposition Exhibit 1 (Ex 2358)?

A I don't know...

In preparing his net worth statement in my case Albert Deschenes had the benefit of two sets of records, Rebecca Tarlow's records and my records. He had my deposits in the bank (S-1) showing the \$5000 July 13, 1956 check from Rebecca Tarlow as well as the \$3000 March check for that year. Why did he ignore them along with Rebecca Tarlow's records and memoranda?

The memoranda along with the recorded mortgages show that my liabilities to Rebecca on December 31, 1958 were \$39,000, \$10,500 more than the figures he prepared for Rebecca Tarlow. Why that major discrepancy? The Government chose to ignore the fact rather than explain the discrepancies. It does not deny the truth of the subsequent testimony of Rebecca Tarlow but criticizes my technique in failing to apprehend its

preparation and adducing false testimony against me at an earlier stage. Somewhere in the law there is a principle that one may not profit by one's own wrong. Is it justice for the Government to say, "You should have caught that lie sooner?" For my inadequacy I apologize.

1. I apologize because I trusted the Government, as did Rebecca Tarlow when she testified that the figures as compiled by Albert Deschenes were correct.

2. I apologize for my prior inability to persuade Rebecca Tarlow to tell the truth after I discovered it until I cross examined her on June 25, 1964 in the case in which she sued me.

3. I apologize for the trial court's also trusting Deschenes and the figures he compiled for Rebecca Tarlow's affidavit.

4. I apologize for the prosecution's zeal in trying to keep the Court from considering the truth as it must now know it.

In *Coleman v. Alabama*, 377 U.S. 129, 130, (1964)  
the United States Supreme Court said:

page 130 The State answers that the claim comes too late, but it has been asserted for the first time by a motion for a new trial. Admittedly, the point was not raised until the filing of the motion for new trial...but the trial judge admitted the petitioner to proceed on his motion. However, the judge sustained objection to all questions concerning the alleged jury discrimination and denied the motion.

page 133 ...this Court must reverse on the ground that the petitioner offered to introduce witnesses to prove the alleged discrimination and the court declined to hear any evidence upon the

## BY INTERNAL REVENUE SERVICE

Melvin Davis

Vol. 2, 2/15/63 pages 1-26

Page 17

Q (By Alexander) You went over your statement, didn't you  
sir, that you made? ...

A That is what I would love very much to bring out.

Q Well, let me ask you if your signature appears on that  
statement, sir?

A It does, under protest.

A (page 19) ... at the time that I signed that I told him  
that he wrote down what I did not say, and that if he pulled me  
to a witness stand that I was not going to hold with all the  
suff he put in there, because I did not say it. I gave him  
an answer and he put down more than my answer, and I told him that  
at the time, and I have my wife and two adult children there at  
the time. He insisted that I sign it or he would take me to jail.

Q (page 24) By Mr. Lenske; Mr. Davis, Mr. Alexander asked  
you whether your wife was available...Is your wife available?

A My wife is here.

Q Was she present at the time this statement was made up.

A She was. I brought her for that specific reason...

Q Well, if Mr. Alexander, wishes, would she be available  
to testify at this time regarding what happened at the time  
this conversation took place?

A Yes.

MR. ALEXANDER (Page 26) If your Honor please, the Government



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Q Was she present at the time this statement was made up.

A She was. I brought her for that specific reason...

Q Well, if Mr. Alexander, wishes, would she be available to testify at this time regarding what happened at the time this conversation took place?

Yes.

MR. ALEXANDER (Page 26) If your Honor please, the Government



can now state we don't want to call Mrs. Davis as a witness in this case or anyone else in connection with something like this.

Jake Preuit

Vol. 4, 2/25/63, pages 12 to 41

Q (By Mr. Lenske) (page 38) Mr. Preuit, on August 17, 1960, at Sun Valley, Idaho, did you have a conversation with Albert P. Deschenes?

A He asked me ... And he had me sign those papers.

Q Were there any threats made to you at that time?

A He said, "Sign these papers or go across the street to jail"...

Q (By Mr. Alexander, page 40) ...And did I tell you to answer the questions honestly, that this is all that we wanted?

A Yes, sir.

Eleanor Bertrand, Rebecca Tarlow and others were not alone in either signing false affidavits prepared and induced by the Internal Revenue Service or in signing affidavits under the unlawful threat of being taken to jail by the agent if they did not.

The court's erroneous assumptions of material facts

stemming from prejudice. See my Opening Brief, 20448, page 41.

Somewhere, not in the record, Judge Carter presumed that I was unwilling to give straight answers to ownership of properties in issue.

Vol. 60, August 13, 1965, page 62.

THE COURT: Well, I asked you one time to tell me what property you owned and what property you didn't own, and I got one of these "yes and no" or "I don't quite know" answers. If you wanted me to go through all these transactions and so forth, you couldn't even then tell me what property you owned and which property you didn't.

MR. LENSKE: I'm glad Your Honor repeated that error. ...Perhaps Your Honor will correct that error. But Your Honor was wrong about that. I am positive that the record will bear me out... The specific ones that came up, which Your Honor were asking, I didn't say yes or no in the manner Your Honor said. I did say I could and would tell of each one as to the specific ones, when I was on the stand. The answer was I didn't own it or I did own it, and that was the truth... I didn't own it then and I don't own it today (This last item referred to the Madelyn (Pavia)(Ryland) Cox property, f 43, Ex 195)

The prejudice was present long ago. Mr. Burdell tried to correct it without success on April 22, 1964, when he said,

Vol. 59, page 2792:

"I may say that it was not my understanding that the defendant refused to disclose his ownership of any properties, if, as and when asked."

On each piece of property that I was asked about I gave straight answers. Following are illustrations and the record shows no instance where I did not give straight answers to questions put to me.

Vol. 47, 7/15/63, 928

Q. (By Alexander) Well, sir, you are familiar with Lot 116, aren't you?

A. Yes

Q. And it is your testimony that that property belongs to Mr. Pierce?

A. Yes.

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Vol. 47 7/15/63 956

Q. (Alexander) Well, on this particular property, 2711 S.E. 125th, did you put Mr. Pierce's name down on that?

A. No, I didn't. That wasn't being in trust for him.

Q. Wasn't that his property?

A. No.

Q. Or your property?

A. No, it was mine. I bought it and it was purchased in my name. I recall, in my name, and I bought it with the view that it would be useable by him for the extension of his trailer court.

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960

Q. Are you saying that you didn't own 6628 Southeast 43rd at the time?

A. Yes, I say that I didn't.

962

Q. THE COURT: If you didn't own it, who owned it? In whose name did you have it?

A. It is not that I had it in the name of anybody else, Your Honor. This was a Madeline Ryland.

MR. ALEXANDER: Cox.

THE WITNESS: She was the owner of the property. She was purchasing it on contract...and the contract of purchase was assigned to Kenneth Armstrong whose money I put up for the purpose.

THE COURT: Then the Vendee's contract was in the name of Kenneth Armstrong?

THE WITNESS: Yes, it was assigned to Kenneth Armstrong.

THE COURT: You put the money up for him?

THE WITNESS: Yes.

The agreement showing that the assignment to Kenneth Armstrong was security for a loan to Joseph and Madelyn Ryland is set out in the ~~22d~~<sup>23d</sup> page of the Madelyn Cox testimony on this brief, designated as Government Sponsored False Testimony Madelyn C. (Pavia) Ryland) Cox.

CROSS EXAMINATION OF DESCHENES SHOULD HAVE BEEN ALLOWED ME BECAUSE:

1. He had filed an affidavit in opposition to my motion for new trial.
2. The deposition taken of his testimony in my civil suit against him was introduced in evidence in this case.
3. He was responsible for a doctored memorandum which related to important evidence in the trial.
4. His testimony in the deposition was in a material respect the antithesis of what he swore to in the case.
5. The test of his verity was important not only as to his deposition testimony and most recent affidavit but as to the whole prosecution since his testimony was a sine qua non for the whole case.

In opposition to my motion for new trial Deschenes' affidavit was filed (CR 48). He said, of the documents displayed to him by Brady on November 10, 1960, that "for the most part related to years subsequent to the years under investigation.

This leaves the remainder not included in "the most part" as instruments within the "years under investigation."

The Government's brief, bottom of page 8 says:

"None of the documents were...used by the Government for leads, or in any other way (Nyman, Ex. A. Dep. p. 35; Deschenes Affidavit, R. 49; Deschenes Dep., Ex. E).



This is stated as a categorical, final fact. I did not and do not accept these conclusions as true. Since 1776 and certainly since 1887 we have not operated under the doctrine that "The king has spoken, long live the king". What the prosecution says, what its witness says is not, constitutionally, the final word until, at the least, the witness' statements are tested by cross-examination.

I shall give one additional illustration why the Government's key witnesses' ex parte statements under oath may not be taken as the final truth. A key item in the case was exhibit 2184. In the civil case I attempted to examine Deschenes about his wrongful seizure of that document. He produced a doctored copy of a memorandum which purported to include a notation of the date when the original of ex 2184 was handed to him. (I claim this was false and that no file was ever handed to Deschenes that included the original of ex 2184).

On page 87 (CR) appears a photostatic copy of that memorandum page, which relates to the "Nevens Gift Certificate", which is exhibit 2184, F.35. I claim that I can prove by cross-examination of Deschenes that the last sentence commencing with the word "Note:" on CR 87 was added at a subsequent time to cover the method and time when the original was stolen from my files by the Internal Revenue Service to use it as evidence against me.

I claim that perusal of that sentence in relation to the rest of that page and all of the remaining 69 pages shows in its fac



that that sentence was added at a later time. Deschenes testified (CR 86) that, of the documents of mine that he took surreptitiously from my files and office building for photostats this is the only one as to which he can give the date of taking because of this memorandum that he made. See Deschenes deposition Ex E.

The same Deschenes testified in the case on April 3, 1968, Vol 28 as follows to my question:

Q. I wish you would tell the jury whether or not you made an entry in your log of the taking from my office,...did you make any entry of any kind in these exhibits about the taking of any papers from my office or building?

A. Well, if you have reference to this gift tax certificate I have no notation in my files. I couldn't even tell you what date it occurred.

I have already pointed out in my brief that Deschenes prepared and introduced Ex 820 and 820 First Amended, which is a net worth statement upon which the court accepted in its findings the conclusions of Deschenes excepting only those specifically disproved by the defense. Deschenes' testimony and verity is the sine qua non of the judgment against me.

Here is clear evidence of memorandum doctoring and false testimony by a key witness on a key item on a key issue in the case. Should there be any doubt that the denial of the right to cross

examine such Government sine qua non witness is a denial of due process and a clear abuse of discretion if such a right were discretionary?

The prosecution presupposes that cross examination would not elicit additional falsities from Brady, Nyman and Deschenes that would materially affect my defense. Pages six through nine of the Government brief set forth numerous facts as though they were final. I contest most of these "final facts" and I am confident many will be disproved on cross examination.

As to the micro-film, there is inconsistency between Brady and Deschenes as to the source of the micro-film, see difference between the testimony of Deschenes in Ex E and the testimony of Brady in Ex C.

To require another of proof of what one expects to prove on cross examination of an adverse witness is in itself an abuse of discretion. It enables a false witness to prepare further falsity; it places a burden on the examiner to relate to the court proof when the examiner can only guarantee hope of proof. Since the witnesses in this case were witnesses who, I claim, stole from me, and have already falsified in material matters, I should have been free to examine them without preconditions.

Deschenes and the Court used as an anchor a statement of me which should have had no legal effect as an admission. See Specification of Error 3, at page 26, Opening Brief, 20448.

Deschenes used as an anchor Ex 2372, Folder 513, which is a statement I furnished the Government of all properties I own or managed as of December 31, 1958. Many items were taken from that statement without corroboration in preparation of the new worth figures that the court accepted from Deschenes' testimony and compilation. This was contrary to law.

#### ADMISSIONS

20 Am. Jur. Evidence, section 546 - "Admissions or declarations to be competent, must have been expressed in definite, certain, and unequivocal language."

5 Wigmore, Evidence (3 ed.) Section 1471 (b)

"The statement must also, conformably with the principles of Testimonial Narration \* \* distinctly import the fact of which it is offered as an assertion."

Conrad, "Modern Trial Evidence, section 458.

Requirement of Certainty. "An admission should possess the same degree of certainty as would be required in the evidence which it represents \* \* .

Dempsey v. Meighen 90 N.W. 2d 178, 184, Minn. 1958.

184 "...for such a declaration to be admissible it should relate to a statement of the decedent which is definite, certain and unequivocal and distinctly import the fact of which it is as an assertion...

The statement is not unequivocal and does not distinctly import the fact for which it is asserted and was therefore properly executed. Furthermore the statements contained in it require explanation."

## DEPRECIATION

### ELMER KOLBERG'S TESTIMONY

The new evidence relating to the testimony of Elmer Kolberg was extremely important because one of the pegs on which the whole Government case rested was Elmer Kolberg's testimony. Since depreciation was a determinative factor on any deficiency and since only through Elmer Kolberg's testimony could the Government even contend that the Court's finding on depreciation has a base in the testimony, any new evidence relating to Elmer Kolberg's qualification to testify in my case was important and fundamental.

Since I had succeeded in learning about and obtaining the testimony of Elmer Kolberg in the later case with its disclosure of Government bias I made that testimony a part of my affidavit and subpoenaed Elmer Kolberg to testify in court on my hearing on the motion for new trial. The court refused to let me call him to the stand, although he had responded to my subpoena duces tecum. I shall now show how important his testimony was and how the law affects his testimony, both in relation to the court's refusal to let me call him to the stand as per <sup>Op br</sup> 20448, pages 13-14, and also in support of my Assignments of Error in depreciation on pages 4-20 of my brief in 19539.

AN EXPERT WITNESS, NO MATTER HOW QUALIFIED GENERALLY, DOES NOT ADDUCE CREDIBLE EVIDENCE IF HE DOES NOT HAVE SUFFICIENT FOUNDATION IN THE FACTS OF THE INSTANT CASE AND A JUDGMENT BASED ON SUCH EVIDENCE IS REVERSIBLE.



## Lagge's Estate

Chester County Report, Pennsylvania,

Vol. 3 page 28, 288 (1948)

"Although the matter was not referred to at oral argument or by paper-book, a question was raised by exception to a ruling at trial. We are of opinion that there was no error in the exclusion of the testimony offered by the petitioners in support of their allegations of gross inadequacy of the sale price. Messrs. Barker and Rowe are real estate brokers who were called as experts by the petitioners. They had no knowledge of the condition of the building upon the real estate in 1944; and, at the time of their inspection and appraisal in 1947, they made no inquiries in regard to any repairs or improvements or change of condition of the real estate made between the years 1944 and 1947, nor were any such visible or apparent to them. The petitioners called other witnesses to prove that repairs and improvements or other changes had been made during that period and thus to give to the expert witnesses additional information upon which, together with their knowledge acquired by their inspection in 1947, they might predicate an opinion of the value of the real estate in 1944. The testimony of these purported factual witnesses was so vague, indefinite and uncertain in regard to the repairs and improvements made that we are constrained to find the experts not qualified, by reason of their lack of knowledge of the condition of the real estate in 1944, and, therefore incompetent to testify to the market value of the real estate in that year."

### City of Omaha v. Omaha Water Co.

30 U.S. 180 1910

The U.S. Supreme Court, distinguishing this case from Continental Ins. Co. v. Garrett, 60 CCA 395, 125 Fed. 589 said:

"The dispute concerned the thing which had been destroyed, the value of something which was not to be inspected and valued from observation, because it was not in existence. Evidence was therefore essential to show what had been destroyed as well as its value. The case is wholly unlike the one here presented."

Irion et al. v. Hyde et al.

105 Pac. 2d 666, 669, 670, 671

672, 674, 1940, Mont.

Plaintiffs sued defendant to enjoin them from maintaining dams alleged to interfere with plaintiffs' prior water rights. The trial court made findings in behalf of defendant and plaintiffs appealed. Reversed.

P. 669 "No competent evidence appears in the record as to the capacity of these holes, absolutely the only testimony offered being that of an electrical engineer who stated that he had taken up hydro-electric engineering and had had some experience in surveying land, measuring reservoirs and computing the volume and flow of water...

Obviously no one could merely look at 119 holes in the ground and pick out four... and credibly testify that their average capacity was even approximately that of the 119...Such testimony obviously constituted no evidence whatever of the contents of the pot holes.

P.670 IN OTHER WORDS, THERE WAS NO EVIDENCE WHATEVER GIVEN ON THE POINT EXCEPT OPINION TESTIMONY BASED UPON UTTERLY INADEQUATE PREMISES.

P.671 (13) An expert witness can give an opinion based upon facts previously testified to by him (State v. Megorden, 49 Or. 259, 88 P.306, 14 Ann. Cas. 130), but cannot be permitted to give an opinion or conclusion on facts known to him and not communicated to court or jury; he must, so far as possible, first detail the facts. State v. Simonis, 39 Or. 111, 65 P. 595; State v. McLennan, 82 Or. 621, 162 P. 828; State v. Willson, 116 Or. 615, 241 P. 843; Northwest States Utilities Co. Brouillette, 51 Wyo. 132, 65 P. 2d 223, 69 P. 2d 623.

In such cases not only the facts, but the conclusions to which they lead, may be testified to by qualified experts... the expert states the facts and gives his conclusion in the form of an opinion which may be accepted or rejected by the jury.



32

Georgia Power Company v. J.C. Livingston

103 Ga. App. 512, 119 S.E. 2d 802, 803 (1961)

The inadequacy of the testimony of Elmer Kolberg to send me to jail is succinctly stated by the Georgia Supreme Court in one clear and logical sentence:

P. 803 Syllabus by the Court:

"A witness is not competent to give his opinion of the value of a house in which he had never been.

Perhaps Judge Carter should have taken a leaf from John F. Kennedy and the Bay of Pigs disaster when, as reported by Theodore C. Sorensen, in the August 10th, 1965 issue of Look magazine on page 50, where he quoted our late president as saying:

"How could I have been so far off base? All my life I've known better than to depend on the experts. How could I have been so stupid, to let them go ahead?"

Agricultural Ins. Co. v. Biltz

64 P 2d 1042,1046 Nev. 1937

In this case it was held that, since the structure had been substantially destroyed, the arbitrators could not reach a sustainable award under a fire insurance policy unless there was evidence adduced of the condition of the structure before the fire.

"The dispute concerned the thing which had been destroyed, the value of something which was not to be inspected and valued from observation because it was not in existence. Evidence was therefore essential to show what had been destroyed as well as its value."

The same rule would, of course, apply to the testimony of Elmer Kolberg of the value and economic life of all buildings which he could not inspect because they were no longer in existence

Continental Ins. Co. v. Garrett,

125 Fed. 589 CCA 6th, 1903 (Tenn.)

Fire insurance damage award by appraisers for \$3,409.7.

Assured filed bill in equity claiming \$5,000, amount of policy.

District Court held award void and entered decree awarding \$00

Circuit court affirmed.

P.590 "and in case of depreciation of the property from us, age, condition, location or otherwise, a proper redct shall be made therefor."

Two of three appraisers reported:

"We have carefully examined the premises and remain of the property ....and have determined the sound al to be \$3,409.72.

P.592

"In the present case the arbitrators were to ascertain and appraise the sound value of a brick dwelling which had been so completely destroyed by fire as that substantially nothing remained of the woodwork, inside or out. The walls themselves were in part fallen. Thus a mere examination of the premises could not, on the evidence in this record, have informed them as to the character of the finishing of the interior work, and its condition before the fire. The appraisers were experienced contracting builders, but, without some evidence how was it possible for them to know the sound value of the loss and damage.

Under such circumstances, appraisers should give notice to both parties of the time and place of hearing, and require evidence in respect of facts which they could not otherwise know.

P. 593

In favor of an apparently just award, many presumptions may be indulged but ...if they undertook to appraise the

loss and damage resulting to the assured without other information as to character of the interior work than that to be derived from such a ruin as this was, they were equally neglectful of their duty, and exhibited an indifference to justice most culpable."

The colloquy on the offer of Kolberg 's testimony appears on page 78 of Volume 60 of the proceedings of August 13, 1965. I said:

MR. LENSKE: ...I want to get his confirmation that he gave that testimony. I want to further show that the bulk of his income, with slight and rare exceptions is from testifying for Governmental bodies; by testifying and appraising values at less than what the property owners in numerous condemnation cases, or their respective witnesses testifies as to what the values are.

THE COURT: Is there any objection to taking his testimony?

MR. ALEXANDER: Yes, I do, Your Honor. That's hardly new testimony and new evidence.

THE COURT: Objection sustained. You can go, Mr. Kolberg.

On the following ~~three~~ pages appear the proceedings relating to the Brady testimony and the court's peremptory admission of the deposition and my exception to it. These two pages are pages 80 and 81 of Vol. 60, 8/13/65 and on pages 82 through 97 set forth the offer of proof and the objections and the rulings of the court and I make them a part of this brief by reference. The court said on page 88:

THE COURT: I sustain the objection ----

On page 89 the court said:

THE COURT: We will attach the Nyman's deposition and file it as part of these proceedings. Was there a deposition taken of Mr. Deschenes also? MR. ALEXANDER: Yes, Your Honor. I will be happy to have that attached also. THE COURT: You may attach it also.



Continental Ins. Co. v. Garrett,

125 Fed. 589 CCA 6th, 1903 (Tenn.)

Fire insurance damage award by appraisers for \$3,409.72. Assured filed bill in equity claiming \$5,000, amount of policy. District Court held award void and entered decree awarding \$100. Circuit court affirmed.

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Two of three appraisers reported:

"We have carefully examined the premises and remains of the property ....and have determined the sound value to be \$3,409.72.

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"In the present case the arbitrators were to ascertain and appraise the sound value of a brick dwelling which had been so completely destroyed by fire as that substantially nothing remained of the woodwork, inside or out. The walls themselves were in part fallen. Thus a mere examination of the premises could not, on the evidence in this record, have informed them as to the character of the finishing of the interior work, and its condition before the fire. The appraisers were experienced contracting builders, but, without some evidence how was it possible for them to know the sound value of the loss and damage.

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Commencing page 80 of 8/13/65, 20448:

MR. LENSKE: Yes, that has been his method of making a livelihood for the past twenty -- ten years. I want to show to what extent he makes his livelihood that way, and to what the Internal Revenue Service knew that and participated with that it has been his practice to bring stolen documents to the Internal Revenue Service, as part of his service in that connection. In that connection, he brought to them somewhere around 250 documents which he stole from my files, which Mr. Deschenes, his superior, knew were stolen from my files.

I want to show that he is one of the sources -- this is one of the sources the Internal Revenue Service had in obtaining pertinent information relating to my transactions.

THE COURT: Any objection to taking that testimony?

MR. ALEXANDER: Yes, Your Honor. This is an allegation by the witness in his own deposition that he submitted. These statements are denied. Whether or not he is actually an informant of the Internal Revenue Service is really irrelevant and immaterial to this case. The only issue is whether or not the Revenue Service suggested the taking of these documents; that they told him to take them. There are depositions, which I submit should be made part of this record. The record shows, in effect, that he wasn't an agent of the Revenue Service; that he never talked to anybody; that he took the documents completely on his own; that he never discussed this case with the Internal Revenue Service or the United States Government until after November 10, 1960. That was after

the documents were taken.

There has been a failure by counsel to make any showing that Mr. Brady was told -----

THE COURT: Objection sustained. The deposition will be made a part of the trial for the purpose of this motion for a new trial. What do you want to prove ----

MR. LENSKE: May I take exception on that, Your Honor, on the basis that not all the factual situations have been disclosed by Mr. Brady in his deposition that I took of him. I have additional facts that I believe, in sitting before a judge, will be more apt to be less evasive, about which I will disclose, which have a direct bearing on the verity of the Government agent and the admissibility of any and all of the documents that were stolen by the Government from me.

THE COURT: You knew all about this when you prepared your affidavits. I take it, everything you talk about is set forth in your affidavits.

MR. LENSKE: No, Your Honor, everything I have talked about is not in my affidavits, because there are additional facts which I didn't put in my affidavits, which I am satisfied I can secure from him alive.

The practice in this District and in the Washington District is to permit live testimony on motions for new trials, as well as evidence by affidavits.

THE COURT: Objection sustained. What do you want to prove by Mr. Nyman?

MR. LENSKE: I didn't hear you, Your Honor.

THE COURT: What do you want to prove by Mr. Nyman? Do you have an affidavit with respect to Mr. Nyman?

MR. LENSKE: Yes, I have, Your Honor. I have made an affidavit with relation to Mr. Nyman and Mr. Deschenes. They are both here in the Courtroom. I would ask the Court not to require me to disclose my examination of them in advance, because I believe what information I should obtain from them will be more cogent if it is gotten fresh without giving them warning as to the way I intend to ask them.

THE COURT: Do you want to make a showing as to what you would elicit from them?

MR. LENSKE, If I do that, I will disclose to them the nature of my examination of them. It will lessen the effectiveness of the testimony that I hope to be able to elicit from them.

THE COURT: I am not going to take any testimony unless you make proof on the record.

MR. LENSKE: I want to object to that requirement; but I have no choice but to comply with it. I believe in proper disposition of the status of my case that the Court should properly let me proceed with my testimony in my own way, rather than restrict me in a position where I cannot examine them without disclosing them what I want to examine them about.

The balance, from pages 83 to 89 of 8/13/65, 20448, is made a part of this brief by reference.

I DID NOT WAIVE THE WRONGFUL INTRODUCTION OF THE DEPOSITIONS. They were not submitted to me.

The Government says on page 10 in paragraph II that the trial judge did not err in denying oral testimony on the taking of my documents by "an employee of the defendant." This again is asserted as a final fact. I believe that when the cross-examination is completed, as I trust this court will permit me, the final fact will be that the documents were stolen from me by employees of the Government and that Brady was one of them.

At the top of page 11 in paragraph A the prosecution says I have no standing to complain of undesignated portions of depositions admitted in their entirety as exhibits below, that I didn't object or designate portions of the depositions that were objectionable.

The prosecution in a high handed manner, with the cooperation of the court, put into the record the depositions of Nyman, Deschenes and Brady: not a portion of them but the whole deposition. The record shows that they were not submitted to me for inspection, they were not identified, they were put in as exhibits as though I were not present, as though the case were a tea party between the prosecution and the trial judge, as though I had accepted the judge's invitation to walk out before the commencement of the argument



on the motion for a new trial, as though I were not a participant in the hearing but the predestined victim to be ignored except for the punishment.

In the face of that kind of proceeding the prosecution, whose obligation it is to see that I get a fair hearing, even when the judge is indisposed to give me one, says that I waived (Ans br 16,17) any error in failing to preserve it for review. Were this an isolated instance it could be minimized. It was not isolated. The prosecution throughout acted in a manner to deprive me of due process. It refused to let me see statements it had from prospective witnesses whom it did not call to the stand. Perhaps I would have called them as witnesses if I had seen the statements. It presented an in camera brief to the first trial judge and never did reveal its contents to me. In one instance in open court Alexander said that he would rather give his reason for making his statement out of my presence (10/57, 8/58-63). A reading of the record will disclose throughout the trial a continuous flow of action, commencing with the subpoenaing witnesses and conducting rump grand jury sessions, non-reporting of the testimony of Nyman and Deschenes before the Grand Jury, sponsoring false testimony, use of stolen documents from me, and numerous other types of action calculated to convict, not to do justice. The culmination, to date, is the high handed prosecution-to-judge lumping of a number of book thickness depositions without exhibiting them to the man whom they want to put into jail on account of what's in them, and then telling

the victim he deserves their unlawful effect because he didn't examine them and pick out the unlawful portions.

Boiled down to simple terms, the prosecution and the trial judge tied my hands quickly and ran and now say that if I didn't like it, I should have struck back then and there.

The very last thing that occurred at the hearing is an illustration. See Vol. 60 8/13/65, page 139:

MR. ALEXANDER: Your Honor, may I ask one thing; there is one document that remains, that should be part of the record. I would like the agreements admitted so we will have all the matters in evidence.

THE COURT: It may be admitted.

MR. ALEXANDER: Thank you.

This demonstrates not merely discourtesy, but prejudice and disregard of my primary, simple and fundamental rights at a trial or hearing in a court of law.

Neither the prosecutor nor the Court was the least bit interested in showing them to me and give me an opportunity to object to them if I saw fit to do so. The depositions, as has been shown, were already in that category.

That agreement, I presume, is the one that Deschenes had in his possession when he swore in the affidavit filed about September 14, 1962 in which he said, CR 44, 19539, "I have no documents in my possession belonging to Mr. Lenske." Nyman made an identical affidavit, CR 46, 19539. The microfilm of about 250 pages of other documents of mine are in the same category. Yet, I was deprived of the right of cross examining these witnesses



EXTRAORDINARY PRIVILEGES

The court granted me no extraordinary privileges and I asked for none. The court did adjourn the case for eleven days (7/29/63 1958-1607) and trial was resumed 8/15/63 and 8/16/63 on adjustments that my accountant had ascertained during the interim from my files and from exhibits that were introduced. He followed the court's direction that photocopies of exhibits and the substance of proposed adjustments be furnished to the prosecution in advance. The reasons for this were twofold. My accountant had gotten into the case after the trial was substantially completed by the Government. He saw numerous probabilities of errors and omissions by the Government. He was right. He found a number of errors and omissions and furnished the prosecution with the necessary photocopies of the exhibits and the substance of the proposed adjustments. Many of these were conceded by the prosecution. Most of them were adopted by the trial court.

THIS WAS NO PRIVILEGE TO THE DEFENDANT. It was a recognition of the faulty, maybe false job that was done by the Government in preparing its net worth. (The Government had not furnished me with any Bill of Particulars in advance or any exhibits to peruse before trial and the trial court had denied my motion for a Bill of Particulars.) Because of the

late entry of my accountant into the case the adjournment was allowed by the Court. The prosecution should apologize for the wrong job it had done rather than prate about extraordinary privileges given to me to correct some of its major errors.

I might point out here that one of the proposed adjustments that was not allowed was the Bertrand item of \$3911.12 and that it was in this period that the \$3911.12 was found and produced by Eleanor Bertrand and that it was after she found that check and the photostatic copy was served on the prosecution that Deschen phoned Mrs. Bertrand long distance to express his displeasure.

The burden to follow up leads, the burden of proof beyond a reasonable doubt was on the Government, not on me, and my accountant simply made up for the failure of the Government to do either an honest or a competent job. As he later stated, it was evident to him that during that period he did not cover all the ground and there remained other adjustments that could likewise be ascertained.

MY CASE DIFFERS FROM ADJUDICATED CASES IN WHICH  
MOTIONS FOR NEW TRIAL WAS DENIED ON GROUNDS OF NEWLY  
DISCOVERED EVIDENCE.

In a number of such cases affidavits were obtained from Government witnesses who had been accomplices or co-defendants and affidavits were impeached by counter-affidavits or other affidavits or by oral repudiation of the affidavits by the affiants themselves.

Not one of the affidavits of my affiants was contested by the Government, not one counter affidavit was filed (except Deschenes, and I shall treat that later) not one recantation occurred. My motion was supported by material and authentic exhibits (See Bertrand and Tarlow). Moreover, a substantial basis for my motion rests on the testimony of adverse witnesses taken under oath, in subsequent litigation, in most of which I was an adverse party. See Tarlow, Deschenes, Nyman and Royal testimony. Kolberg's testimony was in subsequent litigation where he again testified for the Government.

In most of the denied motions the witnesses who subsequently reversed their testimony were persons of doubtful character to begin with. In my case the subsequent affidavits and testimony were given by responsible people and in many instances the incorrectness of the original testimony was directly attributed to the prosecution.

In most of the denied motions the trial court heard whatever testimony the moving party and the Government offered and made findings of fact, which necessitated careful scrutiny of the issues. In mine the court made short shrift and neither verbally or in writing analyzed the newly discovered evidence. In the few instances that the court referred to previous testimony in the record, it made incorrect and unsupportable assumptions.

In most of such denied motions the newly discovered testimony was not subject to physical or other kinds of definite ascertainment. In my case they were, such as the Rebecca Tarlow \$5000. check, the Eleanor Bertrand check stub and her original statement and my duplicate statement (both typing and handwriting of 1957 vintage).

In all of the denied motions that were sustained the appellate court could see from the record that the court had valid basis in the record for its assumptions upon which it based its conclusions. In my case three major assumptions expressed by the court at the hearing on August 13, 1965, were wrong assumptions from the record. They are:

1. That the Nevens gift certificates would have given me substantially all of her property, whereas it was less than half.
2. That the \$500 check of March 1963 was the only one I gave Mary Nevens, whereas I gave her numerous checks previously.
3. That I was equivocal in my answers as to ownership of property in issue, when the opposite was true.

These are major errors of fact in the record and played a major roll in the court's mind.



The inapplicability of many of the citations of the Government to my case is illustrated by its citation of *Maldonado v. U.S.*, 325 F. 2d 295, 297, CA 9, 1963, in answer to the Eleanor Bertrand testimony and the \$3911.12 check. (Ans.br. 24)

The court in that case says on page 297 of the opinion

"Appellant presented his affidavit of Ramos in support of his action recanting much of what Ramos had testified to at the trial. However, at the hearing Ramos repudiated the affidavit and testified that the affidavit, in so far as it was contrary to his testimony at the trial, was a fabrication and not true. The district court believed this testimony of Ramos in this last hearing."

The witness, Ramos, at the hearing, repudiated his affidavit and reaffirmed his original testimony. The court accepted the original testimony as reaffirmed in open court as against the intermittent affidavit.

In my case, Eleanor Bertrand repudiated the Government's prepared and induced affidavit and reaffirmed her testimony, given in open court, as to the consideration for the \$2500 mortgage and as to the consideration for the \$3911.12 check. Hence there is no evidence to sustain the Government's denial of the reduction in my net worth.

The Maldonado case is illustrative of the proper practice of this circuit of permitting live testimony on motions for a new trial. Without such live testimony and without cross examination on Ramos' affidavit, the trial court may not have had the basis for concluding that the affidavit was not correct and that the testimony given in court originally was correct.

THE PROSECUTION VIOLATED DUE PROCESS IN  
ATTEMPTING TO USE AGAINST ME STATEMENTS IN THE  
RECORD WHILE CONCEALING FROM ME AN IN CAMERA BRIEF  
THAT WAS SUBMITTED DURING THE TRIAL EVEN THOUGH IT  
WAS NOT SHOWN TO JUDGE CARTER.

Due Process is violated when the prosecution has submitted  
to the court a memorandum in camera and has refused to serve  
a copy of it on the defendant. This amounts to a secret communica-  
tion to the court. That it was not used by Judge Carter is no  
answer. It may have contained information which I might have  
used before Judge Ross to effect a dismissal before his death.  
It may, and I am confident, does contain material which would  
be useable in my brief against the prosecution, such as to show  
a shift of positions from one interpretation to another of such  
items as depreciation and the different use of contract profits  
or interest, and other items. I believe that I can show from  
that in camera brief and shift in positions that I could not  
possibly be held guilty of using the same interpretation in my  
returns; or, that if the Government's first interpretation is  
taken, then my deficiencies would be eliminated.

So long as there remains a legal document, a memorandum,  
a brief undisclosed to the defendant that was disclosed to the Judge,  
the trial could not have been within the due process requirements.



It is no answer that the Judge was willing to accept a in camera brief. The proffer was wrong, the acceptance was wrong, two wrongs do not make a one-half right. It was abuse of process to proffer a secret document to the Judge, and until I am allowed to see that secret document, the case against me should either be dismissed or abate.

Everything I said is in the record, either on file or in the reporter's transcript. Not so as to the prosecution. There is a substantial body of what they said which is not in the record and which I cannot use against them.

The prosecution has attempted to use against me statements in my brief and statements I made orally to the court and even concessions made by my accountant or my co-counsel before the Court. All of my statements, written and oral, are a part of the viewable and reviewable record.

Not so the prosecution. One of its major statements to the court is not reviewable by the appellate court because it is keeping that statement secret and I am unable to assert the admissions or concessions that the prosecution made to the court and which should be at least as binding on it as it comes that I am bound by the statements or concessions I have made.

This procedure by the prosecution is an abuse of process and is a violation of due process and has inherent prejudice. As the U.S. Supreme Court said in:

Turner v. Louisiana, 379 U.S. 466, 470,  
473, Jan. 18, 1965:

"The Louisiana Supreme Court said, 470:

'...unless there is a showing of prejudice, a conviction will not be set aside...This court is inclined to look upon the practice with disapproval, however, because in such cases there may be prejudice of a kind exceedingly difficult to establish'.

To this Justice Stewart, at page 473, said:

"...it would be blinking at reality not to recognize the extreme prejudice inherent..."

DUE PROCESS - IN CAMERA BRIEF

4/22/64 Vol. 59, Page 2809

MR. LENSKE: I want to point out for the record some additional errors. I want to point out the unfair procedure which permeated this case by the prosecution, and on that score I would at this time call upon Mr. Alexander to provide the Court and mark and exhibit the in camera brief that Counsel had provided originally for Judge Ross...It affects some of the theories in the case, and I will show Your Honor how....

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THE COURT: Was there an in camera brief handed to Judge Ross which was not served upon the defendant?

MR. ALEXANDER: Your Honor, this came up before Judge Ross in the presence of the defendant. The Government asked that it be permitted to serve a trial brief on the Court and that the defendant be given the same privilege. The defendant said he wanted to exchange brief, and the Government said they would not exchange briefs but they would submit one and that the defense could submit one. Judge Ross said fine he would take trial briefs from both parties. We submitted trial briefs....

THE COURT: Your offer is overruled. I don't want to hear any more about it. However, don't ever in my court serve me with a trial brief without serving the defendant.....

The prosecution refers to its brief in 19539 in which it states on page 19 that "The defense admitted that the defendant had made the advances to Mrs. Bertrand reflected as an accounts receivable on the Government net worth (R.611)..."

The prosecution uses my brief as an admission which it contends should and does stand in lieu of evidence.

If that is correct this means that everything I did, everything I said in court, everything I filed or presented to the court was open to the prosecution to be used against me.

This was not true of the prosecution. It filed with the court an in camera brief and that has never been revealed to me. I have been unable to get a look at it, I am unable to use the admissions that the prosecution made in it in lieu of evidence or as an admission of the result of the evidence.

Until that in camera brief is disclosed to me and until I am empowered to use admissions in it for my benefit I am being denied due process, I am being denied the equal protection of the law with that given the plaintiff in the case.

To this extent it makes no difference that Judge Carter has never seen it and has not used it. The essential fact is that I have not seen it, I was not given an opportunity to use it.

Since the court has based its finding and ruling on the constitutional question of violation of the Fourth and Fifth Amendments and what I contend was the stealing of my documents by Deschenes, Nyman and now also Brady, on Zap v. United States, 328 U.S. 624, I have read all U. S. Supreme Court decisions written in the past few years involving wrongful search and seizure. I found ten cases of reversal on certiorari due to violation of the Fourth Amendment. They are collated on the next page. I believe that by inference they reverse or modify the Zap case.

Also there are two important differences between the Zap case and mine. I did not waive the right of inspection by contract with the U. S. Navy and I therefore could make any restrictions I chose. I told Mr. Nyman the very first time he came in that I would not permit any of my records to go out of the office. (4/15/63, Vol. 36, 108). This was not denied by Mr. Nyman when he was asked about it on two different occasions. The first was on March 27, 1963, Vol. 25, page 92 and the second was when I took his deposition in 1965, Ex A and B. I cannot give the exact page since I do not have a copy of the depositions and they are in San Francisco, I believe. In both instances his answer was that he did not remember. This coupled with the surreptitiousness of the taking of the records should convince any reasonable mind that the agents were expressly forbidden to take any records out of the office. Deschenes said he didn't ask permission because of the time he had to wait for files but he admitted it would have only taken one minute to ask permission.



# U. S. Supreme Court - Fourth Amendment

Convictions reversed by U. S. Supreme Court in less than two years, December 2, 1963 to October 18, 1965, for violation of Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

<u>Case, Citation</u>	<u>Opinion by Justice</u>	<u>Date Decided</u>	<u>Nature of Case</u>
Fahy, v. Connecticut 375 U.S. 85.	Warren, C.J.	Dec. 2., 1963	Wilfully injuring public property (Swastika case)
Reston, v. U.S., 376 U.S. 364	Black	Mar. 23, 1964	Conspiracy to rob bank
Stove v. California 376 U.S. 483	Stewart	Mar. 31, 1964	Armed robbery
Massiah v. U.S., 377 U.S. 201	Stewart	Mar. 18, 1964	Narcotics
Aguilar v. Texas 378 U.S. 108	Goldberg	June 15, 1964	Narcotics
Beck v. Ohio 379 U.S. 89	Stewart	Nov. 23, 1964	Poss. of clearing house slips
Henry v. Mississippi 379 U.S. 443	Brennan	Jan. 18, 1965	Indecent proposal to girl
Stanford v. Texas, 379 U.S. 476	Stewart	Jan. 18, 1965	Poss. of Communist books
One 1958 Plymouth v. Pa. 380 U.S. 697	Goldberg	Apr. 29, 1965	Forfeiture
*Griswold v. Conn. 381 U.S. 479	Douglas	June 7, 1965	Contraceptive advice
James v. Louisiana 381 U.S. 36	Per Curiam	Oct. 18, 1965	Narcotics

\*This was not a direct search and seizure case but the opinion says on page 484 "The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'"



## CONCLUSION AND MOTION

The United States Supreme Court said in *Grunewald v.*

U. S., 353 U.S. 391, 423, on May 27, 1957:

We are not unmindful that the question whether a prior statement is sufficiently inconsistent to be allowed to go to the jury on the question of credibility is usually within the discretion of the trial judge. But where such evidentiary matter has grave constitutional overtones, as it does here we feel justified in exercising this court's supervisory control to pass on such a question.

My case is steeped in strong Fourth and Fifth Amendment constitutional and Bill of Rights issues of law and fact and I ask the appellate court to scrutinize both of them carefully and to analyze each of the issues I have raised carefully and fully, even though, I am sure, I have not presented them fully or adequately or in best briefing form. I have had to do my own work, including most of the typing myself, as I no longer have my faithful secretary. I did not complete my brief in 20448, although I believe no more than ten pages will cover the points and issues raised by the prosecution in its answering brief that I have not touched in this brief. With the exception of one or two items which are the same as in 19539 I have not covered the answering brief in the main case. I ask for an extension of time to do so, a limited time, such as two weeks from date of ruling; or, if the Court should see sufficient prima facie merit in my appeal in 20448, that it set that down for hearing immediately and extend the reply brief in 19539 till decision on 20448. The record in 20448 is much shorter and the issues much more limited. I have read rule 18 and have done the best I can to fulfill its requirements and shall ~~shall~~ do my best to make up a list of exhibits and comply otherwise.

*Paul L. Ladd*

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FEB 14 1967

REUBEN G. LENSKE, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Appellee. )  
 )

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No. 20448

BRIEF OF NATIONAL LAWYERS GUILD

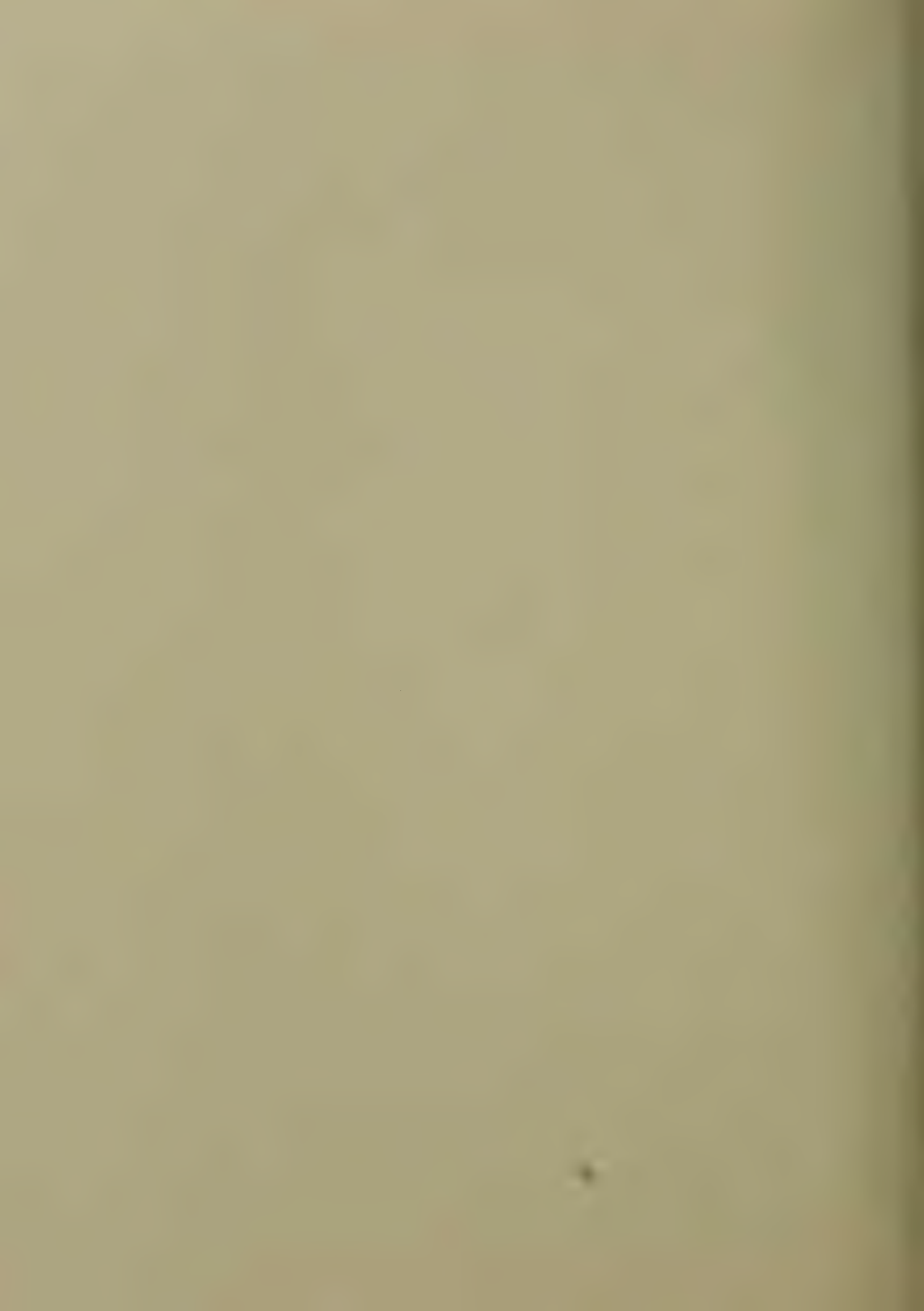
AS AMICUS CURIAE

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ERNEST GOODMAN

Of Counsel



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

REUBEN G. LENSKE, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, )  
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 Appellee. )  
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The Trial Court Deprived Appellant of Constitutional  
Rights in Proceedings Upon Motion for New Trial

Following his conviction, appellant Reuben G. Lenske moved for a new trial on the ground of newly discovered evidence, pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The appellant had initially been convicted for violations of the income tax law, a conviction which had been obtained by the Government by use of the net worth procedure. The validity of the net worth procedure depended, of course, upon the presentation of competent evidence of the amount and value of the assets of appellant at both the beginning and end of the accounting period. This in turn depended upon the reliability of the testimony of the government agents and appraiser offered by the Government in support of its case. The net worth method was approved by the Supreme Court in Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), but the opinion enjoins caution in making use of it.

In moving for a new trial, the appellant produced supporting affidavits and other data which, if accepted by the trial court, might well have established that the prosecution witnesses had lawlessly acted in obtaining the private papers of appellant, had been patently biased and prejudiced against appellant and had erroneously and without basis caused the conviction of appellant by an improvised net worth method which the prosecution witnesses knew was without basis in fact.

The Government of course opposed the motion of appellant and



by its opposing papers endeavored to show the trial court that appellant's motion for a new trial was without support either in law or in fact.

In deciding the issues thus presented, the trial court appears to have unduly restricted some of the legal and constitutional rights of appellant. For example, during the hearing the Government, in opposition to appellant's arguments, proceeded to offer to the Court the depositions of certain government agents which appellant had taken in a prior civil suit instituted by appellant and which to some extent involved different and separate issues than those which were involved on the motion for a new trial. Although some of the government agents were present in Court at the time these depositions were accepted by the trial judge on the motion for new trial, the trial judge refused to permit these government agents to be called by appellant and be cross-examined by him. One government agent had executed an affidavit which the Government used in opposition to the motion for a new trial made by appellant. Although this government agent was in the courtroom, the trial judge refused the appellant the right to cross-examine such government agent. The appraiser witness was also in the courtroom. The appellant sought to call him as a witness, but, upon the opposition of the Government, the trial court refused to allow said witness to testify. Although the appellant was not permitted to call these witnesses and cross-examine them, despite the fact that depositions and affidavits were being used against him, the Government nevertheless relied on those depositions





impossibility of producing the affected witness live. That indeed is fundamental to and a part of the appellant's right to confront and cross-examine witnesses in criminal proceedings.

" . . . As the Court said in *Mattox v. United States*,

" 'The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand the manner in which he gives his testimony whether he is worthy of belief.' 156 U.S. 237, 242-243, 15 S.Ct. 337, 339, 39 L.Ed. 409 [1895].

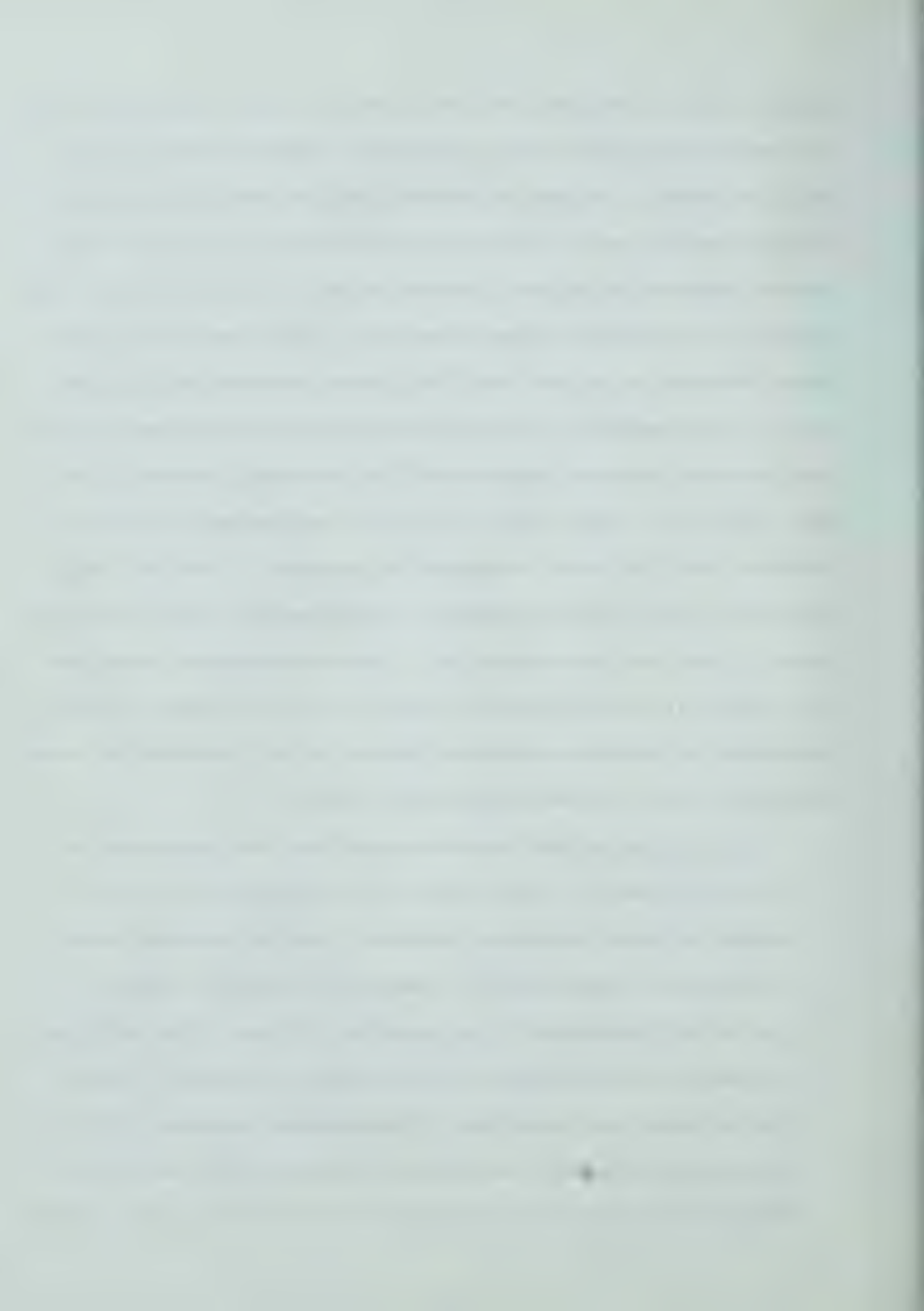
"See also 5 Wigmore, Evidence §§ 1365, 1397 (3d ed.1940); *State v. Hester*, 137 S.C. 145, 189, 134 S.E. 885, 900 (1926)."  
*Douglas v. Alabama*, 380 U.S. 415, 418-419, 85 S.Ct. 1074, 1076-1077 (1965).

It should be noted that in the proceedings herein, cross-examination was denied even though live witnesses were present. If appellant had examined some of these witnesses in a prior civil proceeding and taken their depositions, that is no reason, it is submitted, for denying appellant the opportunity to cross-examine the government witnesses who were present during the criminal proceedings on the motion for new trial. The issues involved in the civil action brought by appellant



against government agents were different from those facing the criminal court in the action herein, especially on the motion for a new trial. In addition, it appears clear that the depositions taken in the civil proceedings were taken under circumstances in which the witnesses were hostile and the appellant unable to elicit the testimony to which he was entitled. On the other hand, before the District Court these witnesses could have been fully cross-examined by appellant and the Court enabled to look upon the witnesses and determine from their answers and from their manner and answering whether or not they had been or were worthy of credence and whether or not their testimony was competent to support the judgment of conviction which had been rendered against appellant. Appellant was denied the opportunity to make such demonstration by cross-examination, while the Government argued at length the truth of its position based upon the depositions of witnesses who were present in the courtroom but whom the District Court refused to call to the stand.

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might





be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots . . . ."

Green v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 1413, 3 L.Ed. 2d 1377 (1959).

Appellant had been convicted of a serious offense, and the judgment of conviction will undoubtedly substantially affect his liberty and livelihood. The motion for a new trial upon the ground of newly discovered evidence under the Federal Rules of Criminal Procedure is a guaranty to an accused that the federal courts are always open to right a miscarriage of justice. A judge, it is respectfully submitted, vested with statutory authority to grant or deny a motion for a new trial, should conduct such proceedings with the most scrupulous regard for the rights of the accused. The exercise of judicial discretion should be exercised under circumstances which will satisfy justice and the appearance of justice. Due process of law includes at least the idea that a person accused of a crime shall be accorded a fair hearing through all the stages of the proceedings against him. The high commands of due process are not obeyed, it is submitted, if important witnesses present in the courtroom are not permitted to be subjected to cross-examination while their depositions and ex parte affidavits are accepted as evidence against the claims of the accused.

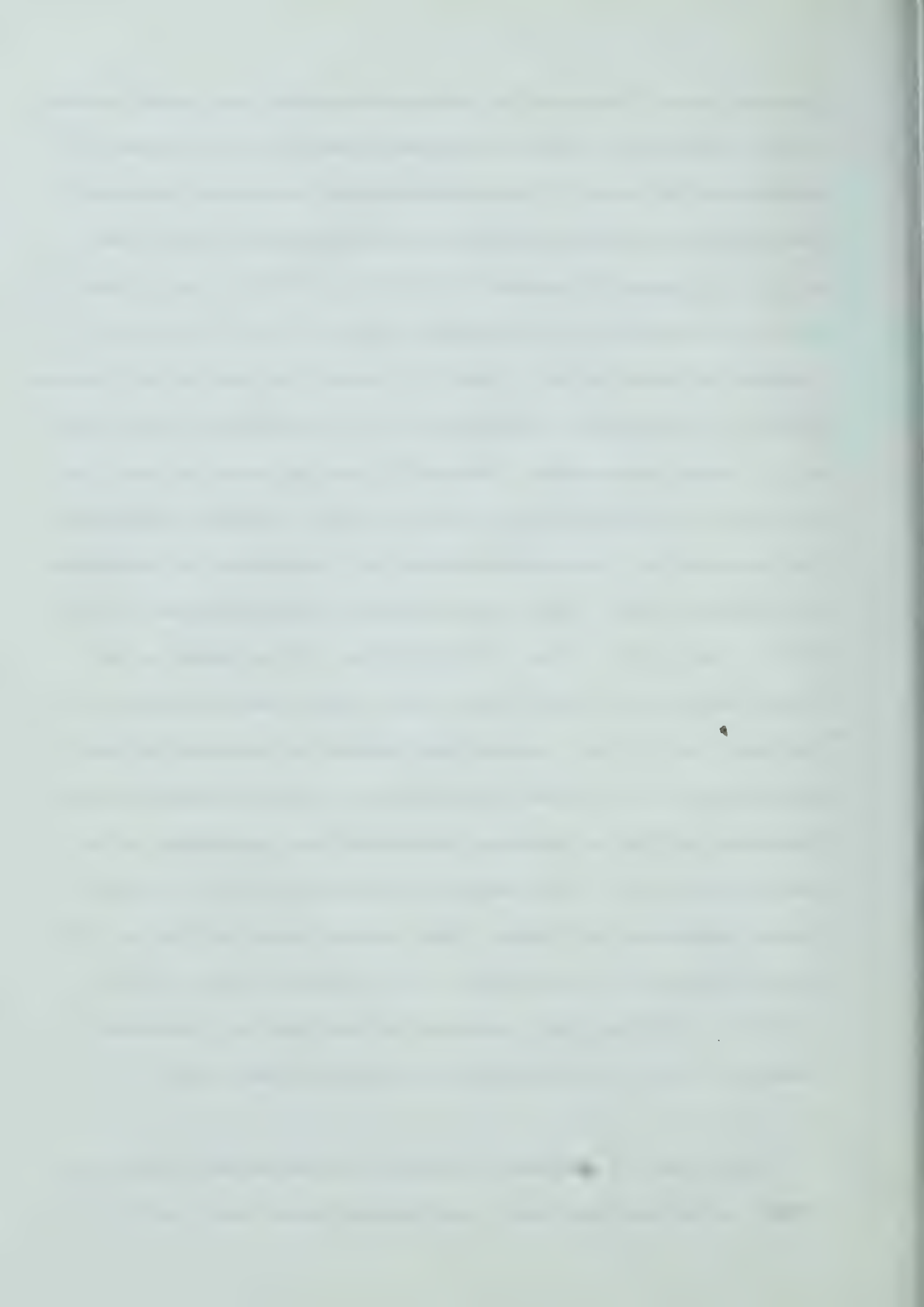
"It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a



criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. See, e.g., 5 Wigmore, Evidence § 1367 (3d ed. 1940). The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. Moreover, the decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases. This Court in *Kirby v. United States*, 174 U.S. 47, 55, 56, 19 S.Ct. 574, 577, 43 L.Ed. 890, referred to the right of confrontation as '[o]ne of the fundamental guaranties of life and liberty,' and 'a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the constitution of the United States and in the constitutions of most, if not of all, the states composing the Union.' Mr. Justice Stone, writing for the Court in *Alford v. United States*, 282 U.S. 687, 692, 51 S.Ct. 218, 219, 75 L.Ed. 624, declared that the right of cross-examination is 'one of the safeguards essential to a fair trial.'

. . . .

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their



expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. In *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682, this Court said:

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense--a right to his day in court--are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.' 333 U.S., at 273, 68 S.Ct., at 507 (footnote omitted).

"And earlier in this Term in *Turner v. State of Louisiana*, 379 U.S. 466, 472-473, 85 S.Ct. 546, 550, 13 L.Ed.2d 424, we held:

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right to confrontation, of cross-examination, and of counsel.'

"Compare *Willner v. Committee on Character & Fitness*, 373





"[T]he privilege of confrontation, . . . ' . . . was intended to prevent the conviction of the accused upon depositions or ex parte affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination. '"

Snyder v. Massachusetts, 291 U.S. 97, 106-107, 54 S. Ct. 330, 332-333, 78 L. Ed. 2d 674 (1934).

This basic concept is pervasive in the decisions of the courts. United States v. Coplon, 185 F.2d 629, 637-638 (2d Cir. 1950); Wilson v. Gray, 345 F.2d 282, 286 (9th Cir. 1965); Barton v. United States, 263 F.2d 894, 897-898 (5th Cir. 1959); United States v. Douglas, 155 F.2d 894 (7th Cir. 1946).

#### Conclusion

It is respectfully submitted that the order of the United States District Court for the District of Oregon denying appellant's motion for a new trial should be reversed.

Dated, February 28, 1966, at San Francisco, California.

Benjamin Dreyfus,  
Attorney for National Lawyers Guild

Samuel Rosenwein  
Nels Peterson  
Norman Leonard  
David Rein  
Ernest Goodman

Of Counsel



## APPENDIX





UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

February 23, 1966

Address Reply to the

Division Indicated

and Refer to Initials and Number

FMR; LAJ:JMHoward;mof

5-61-1558

AIR MAIL

Benjamin Dreyfus, Esq.  
Attorney at Law  
501 Fremont Building  
341 Market Street  
San Francisco, California 94105

Re: Reuben G. Lenske v. United States  
No. 20448, Ninth Circuit Court of Appeals

Dear Mr. Dreyfus:

Reference is made to your letter of February 7, 1966 addressed to United States Attorney Lezak, in which you enclosed a copy of a proposed brief amicus curiae on behalf of appellant in the above-entitled matter. You requested that the United States Attorney consent to the filing of the brief. Since the case is being handled by the Department at Mr. Lezak's request, he promptly forwarded your letter to us.

This is to notify you that we will consent to the filing of your brief amicus curiae.

Sincerely yours

RICHARD M. ROBERTS  
Acting Assistant Attorney General  
Tax Division

By: *Lee A. Jackson*  
LEE A. JACKSON  
Chief, Appellate Section

cc: William B. Luck, Esq.  
Clerk, U.S. Court of Appeals  
P. O. Box 547  
San Francisco, Calif. 94101

Sidney I. Lezak, Esq.  
United States Attorney  
Portland, Oregon 97207





## PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA )  
City and County of San Francisco ) ss.

Dorothy Wood, being first duly sworn, deposes and says:

I am a citizen of the United States, over the age of eighteen years, and not a party to or interested in the within action; my business address is 501 Fremont Building, 341 Market Street, San Francisco, California 94105.

I served the within BRIEF OF NATIONAL LAWYERS GUILD AS AMICUS CURIAE by placing three copies thereof in envelopes addressed to each of the following:

Richard M. Roberts, Esq., Acting  
Assistant Attorney General, Tax Division  
United States Department of Justice  
Washington, D. C. 20530

Sidney I. Lezak, Esq.  
United States Attorney  
United States Courthouse  
Portland, Oregon 97207

Reuben Lenske  
1014 S. W. Second Avenue  
Portland, Oregon 97204

which envelopes were then sealed and postage fully prepaid thereon, and thereafter were, on March 2, 1966, deposited in the United States mail at San Francisco, California.

Dorothy Wood

Subscribed and sworn to before me  
this 2d day of March, 1966.

Zaide Kirtley  
Notary Public in and for the City and  
County of San Francisco, State of  
California. My Comm. Exp. Jan. 7, 1967.



FEB 14 1967

No 20451

In The  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EDWIN JONES MONTGOMERY, SR., et al., )  
Petitioner, )  
vs. )  
COMMISSIONER OF INTERNAL REVENUE, )  
Respondent. )

---

PETITIONER'S OPENING BRIEF

JOHNSTON & PLATT  
833 First Western Building  
Oakland, California 94612

FILED

FEB 12 1966

WM. B. LUCK, CLERK



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No. 20451

In The  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EDWIN JONES MONTGOMERY, SR., et al.,     )  
  )  
  Petitioner,     )  
  )  
  vs.             )  
  )  
COMMISSIONER OF INTERNAL REVENUE,     )  
  )  
  Respondent.     )  
\_\_\_\_\_

PETITIONER'S OPENING BRIEF

\_\_\_\_\_  
STATEMENT OF JURISDICTION

The Tax Court of the United States, having jurisdiction  
under/<sup>26</sup>U.S.C. §§ 6213, 6214 and 7442, heard this case upon an  
Amended Petition filed by petitioner<sup>1</sup> on August 18, 1964 (I-A  
Tr. 33).<sup>2</sup> On April 15, 1965, the Tax Court dismissed the  
petition (I-A Tr. 71), and on May 12, 1965, it denied petitioner's  
motion to set the order of dismissal aside (I-A Tr. 72). The

\_\_\_\_\_  
<sup>1</sup>Throughout this Brief, the singular noun "petitioner"  
will be used to refer to Edwin Jones Montgomery, Sr. Mr.  
Montgomery's wife, Dorothy Scott Montgomery, is named as a party  
herein and was so named in proceedings in the Tax Court because  
she and her husband filed joint tax returns throughout the years  
in question.



case is before this Court on a petition for review timely filed in the Tax Court on July 12, 1965 (I-A Tr. 84), 26 U.S.C. §7483, and a stipulation as to venue filed August 12, 1965 (I-A Tr. 98). This Court has jurisdiction pursuant to 26 U.S.C. §7482.

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### STATEMENT OF THE CASE

This appeal is concerned with the propriety of the Tax Court's rulings on petitioner's request for additional time within which to prepare his case.

Petitioner graduated from college in 1936 (II-B Tr. 36). By 1946 he had, largely through an investment advisory business, built a fortune of more than \$250,000.00 (II-B Tr. 38). In that year, he formed a corporation to operate a helicopter service in Arizona (II-B Tr. 38-39). This venture was not successful, and by 1950 petitioner had lost his own fortune together with some \$50,000.00 to \$75,000.00 invested by friends (II-B Tr. 44). From that time until the time of trial, petitioner "habitually worked nights and weekends" (I-A Tr. 79) in an effort to regain

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<sup>2</sup>References to volume I-A of the transcript will be designated "I-A Tr. \_\_\_\_." References to volume II-B of the transcript will be designated "II-B Tr. \_\_\_\_." In volume II-B, the pages which relate to proceedings in Washington on May 27, 1964, are separately numbered from those relating to proceedings in San Francisco in April of 1965. Page numbers of volume II-B will, throughout this Brief, refer to the transcript of the proceedings in San Francisco unless the context indicates otherwise. The transcript of proceedings in San Francisco begins on what is actually the seventh page of volume II-B.

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his vanished affluence. He spent most of his time outside regular working hours unsuccessfully pursuing large commissions (II-B Tr. 71, 72), attempting, for example, to resuscitate a dormant helicopter company (II-B Tr. 66-68) in the hope of earning a \$50,000 commission.

Throughout 1957, 1958, and part of 1959, petitioner's home was in Newtown, Pennsylvania (II-B Tr. 46). On March 24, 1959, a fire destroyed all of the business records which petitioner possessed at that time (I-A Tr. 79, 82, 83). In the same year, petitioner moved to California. Throughout this time he continued to work nights and weekends (I-A Tr. 79).

At some time during this period, the Internal Revenue Service audited petitioner's tax returns for the years 1952 through 1956, and cases involving these returns were docketed in the Tax Court. These cases were twice continued and then settled (II-B Tr. 7).

In April of 1961, the Internal Revenue Service first contacted petitioner concerning an audit of the years 1957 through 1959 (II-B Tr. 109). Later, the Internal Revenue Service added the year 1960 to the years already under audit (I-A Tr. 7). Some of the deductions claimed in the return were allowed by the Internal Revenue Service during the course of subsequent negotiations (II-B Tr. 117), but on December 12, 1963, the Internal Revenue Service issued a statutory notice of deficiency disallowing other deductions, including all of



petitioner's claimed business losses, and losses on Arizona rental property (I-A Tr. 7).

From then until the summer of 1964, such time as petitioner felt he could spare for his tax case was devoted to the preparation of various papers for filing in the Tax Court. He filed a six page Petition on March 6, 1964 (I-A Tr. 1). The Government moved to dismiss (I-A Tr. 20), and on May 25, petitioner filed a five page amendment to his petition (I-A Tr. 23) and a three page answer to respondent's motion (I-A Tr. 28). The Court on May 27 found that petitioner's amendment did not cure the defects in his petition and ordered him to file a "proper amended petition" by August 20 (I-A Tr. 32). At this point, petitioner consulted counsel and on August 18, 1964, filed an Amended Petition (I-A Tr. 33).

During the same month, petitioner moved with his family to Carson City, Nevada (I-A Tr. 80), where he took a job as Budget Analyst for the Nevada Legislative Council Bureau (I-A Tr. 67, 69). In his capacity as Budget Analyst, petitioner entered upon a season of extra heavy workload in November (I-A Tr. 57, 67, 69). During most of this period, the Nevada Legislature was in session, and petitioner was required to meet with committees of the Assembly and Senate virtually every day and to work most weekends (I-A Tr. 57). His duties included analysis of all Assembly and Senate bills, of which there were over 900, for their impact upon the budget



of the State government (I-A Tr. 67, 69). This situation continued at least through the Thursday immediately preceding trial in the Tax Court (II-B Tr. 8).

Faced with this picture, the Court made four rulings, each of which involved fundamentally the same issue, and each of which is the subject of a specification of error herein:

(1) On March 1, 1965, petitioner filed a Motion for Continuance (I-A Tr. 57), stating in support thereof that his duties with the Nevada Legislature would not allow sufficient time to prepare for trial. This motion was further supported by declarations signed by petitioner (I-A Tr. 67) and by his superior (I-A Tr. 69) and filed on March 24. The respondent opposed this motion, but made no comment whatever with respect to petitioner's duties with the Legislature (I-A Tr. 61-66; II-B Tr. 3-5). The Tax Court denied petitioner's motion on April 5, and set the case for trial to begin on April 7, 1965 (II-B Tr. 8, 10).

(2) On April 8, petitioner concluded that further trial without adequate preparation was pointless, and renewed his motion for continuance (II-B Tr. 94). The Court again denied the motion (II-B Tr. 101).

(3) Respondent's motion to dismiss for lack of prosecution followed (II-B Tr. 112), which the Court granted (II-B Tr. 120)(I-A Tr. 71).

(4) Petitioner on May 10 filed a Motion to Set Aside Order of Dismissal (I-A Tr. 72) and a supporting





declaration (I-A Tr. 78). The Court denied this motion two days later (I-A Tr. 72).

---

SPECIFICATION OF ERRORS RELIED UPON

1. The trial court erred in denying petitioner's motion for a continuance on April 5, 1965.
2. The trial court erred in again denying petitioner's motion for continuance when it was renewed on April 8, 1965.
3. The trial court erred in granting respondent's motion to dismiss the case for failure to prosecute.
4. The trial court erred in denying petitioner's motion to set aside order of dismissal.

---

SUMMARY OF ARGUMENT

The "discretion" a court is required to exercise in ruling on a motion for continuance or dismissal "is not a capricious or arbitrary discretion, but an impartial discretion . . . to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." Bailey v. Taaffe, 29 Cal. 422, 424 (1866). The court below did not so exercise its discretion in this case. It did not fairly weigh the prejudice to petitioner that followed from the action it took against the complete lack of prejudice to respondent had it chosen the alternate course. Instead, it considered only



its own convenience. The Court made up its mind before learning the facts.

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ARGUMENT

I. IN RULING ON PETITIONER'S MOTION FOR CONTINUANCE, AND ON RESPONDENT'S MOTION FOR DISMISSAL, THE TAX COURT FAILED TO EXERCISE ITS DISCRETION IN A LAWFUL MANNER.

The fundamental question the Tax Court had to answer was whether petitioner should have more time within which to gather his documentation and prepare his case<sup>3</sup>. In arriving at the answer to that question, the Court was required to exercise "discretion." That word has been aptly defined in an oft-quoted

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<sup>3</sup>Following are the applicable Tax Court Rules of Practice:

Rule 27(d)(1) - Court actions on cases set for hearing on motions or trial will not be delayed by a motion for continuance unless it is timely, sets forth good and sufficient cause, and complies with all applicable rules.

Rule 19(b) - Motions will be acted upon as justice may require . . . .

Rule 20(a) - An extension of time . . . may be granted by the Court within its discretion upon a timely motion filed in accordance with these Rules setting forth good and sufficient cause therefor . . . .

Rule 21 - A case may be dismissed for cause upon motion of either party or of the Court.



opinion of the California Supreme Court:

"The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." Bailey v. Taaffe, 29 Cal. 422, 424 (1866).

Did the Tax Court judiciously and lawfully exercise its discretion, or did it act arbitrarily and capriciously? A careful reading of the record demonstrates that it followed the latter course.

When petitioner's Motion for Continuance first came on for hearing on April 5, 1965, it was evident that petitioner was not and could not have been ready for trial. Petitioner had been involved in a period of extra heavy work on behalf of the Nevada Legislature ever since the previous November (I-A Tr. 57, 67, 69). Even if all necessary records and documentation had been gathered prior to November of 1964, it is not realistic to suppose that petitioner and his counsel could have engaged in the sort of preparation that is always necessary shortly before trial if the litigant's case is to be adequately presented. The Court brushed this difficulty aside: "We all have that difficulty of business" (II-B Tr. 8). Work being done for a state legislature in





session is not the sort of "difficulty of business" that "we all have." The worker in such circumstances cannot arrange his own affairs; he must adapt himself to the convenience of the legislature.

Respondent made no showing of any prejudice which he would have suffered had the continuance been granted. No witnesses had been called by respondent, nor did any other reason appear to make it important to him that the case be tried at the April 5 calendar rather than at a later time.

Indeed, the Court made it clear that it was considering not the equities between petitioner and respondent but its own convenience:

" . . . We can't set it for call and come out from Washington - I come out and bring my Clerk - and still somebody isn't ready . . . ."  
(II-B Tr. 9).

Alamance Industries Inc. v. Filene's, 291 F.2d 142 (1st Cir. 1961) provides some analogy to the present case. Appellant therein was not prepared to go to trial in Massachusetts because it had been seeking a determination of the same issue in North Carolina. The District Court in Massachusetts offered appellant the choice of a dismissal with prejudice or trial in 60 days. At the trial which followed, appellant stood mute and its complaint was dismissed. Said the Circuit Court at page 145, 6:

"Apparently what principally lay behind the district court's determination to try the case is to be found in



its remark, made at the first hearing, that the 'public interest' of not having a case lie on its docket for fourteen months must control 'regardless of private interest.' We cannot accept this statement either as the formulation of a generally applicable principle or as a proper criterion for the disposition of this particular case. Courts exist to serve the parties, and not to serve themselves, or to present a record with respect to dispatch of business. Complaints heard as to the law's delays arise because the delay has injured litigants, not the courts. For the court to consider expedition for its own sake 'regardless' of the litigants is to emphasize secondary considerations over primary."

In any event, and despite the implication in the Court's remarks that it would not have enough to do if petitioner's case were not tried, it is obvious that its own convenience would not have been upset had the continuance been granted. The Court had more than enough cases to keep it busy; even though his Honor stated that "I will try to be as generous as I can in setting a time" (II-B Tr. 9), the Court heard at least one case after petitioner's case (II-B Tr. 29).

Up to that time, the case had certainly not languished in the Tax Court. It was set for trial as expeditiously as it possibly could have been; an order for trial status report indicating that the case would be set for trial on April 5, 1965 was dated September 25, 1964 (I-A Tr. 101), eight days after the case was put at issue by the filing of

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respondent's answer (I-A Tr. 54).<sup>4</sup> No continuances had previously been granted or requested; the case is therefore unlike such cases as Silagye v. Commissioner, 192 F.2d 886 (2nd Cir. 1951) and similar cases in which continuances had been granted previous to the denial of continuance complained of.

Nor does this case bear any similarity to such cases as Homer H. Germaine, 11 TCM 226, in which petitioners first announced that they were read for trial and only moved to continue after it became apparent that their proof would fail. Petitioner herein made it abundantly clear that he was proceeding to trial only because the Court left him no alternative, and that he had proof of his claims but that it was not ready. His motion for continuance was grounded upon the fact

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<sup>4</sup>Petitioner's response to the order for trial status report made it clear that petitioner did not expect that he could be ready for trial by April (I-A Tr. 102). The response was, through inadvertence, not mailed until December 16, 1965, seven days after the date specified in the order (I-A Tr. 101). In the ordinary course of events, the Tax Court would nevertheless have received it well in advance of December 22, when it prepared the calendar for the April 5, 1965 San Francisco session (I-A Tr. 99), and of December 30, which is the date of Notice Setting Case for Trial (I-A Tr. 56). The certificate of Howard P. Locke dated October 13, 1965 (I-A Tr. 99-100) was the first advice to petitioner that the Tax Court had no record of receipt of his response. According to that certificate, "response to trial status orders are not permanently retained or made a part of the record in a case;" it is not clear whether there would exist any record of the response if it had been received.





that he was not ready for trial. When he attempted to put on a case in these circumstances, he floundered, as he had, in effect, told the Court he would. Some of the Court's remarks, when placed against the situation which petitioner had frankly described to the Court, are illuminating:

"He must have records or some data by which he can identify the places of employment and residence and work."  
(II-B Tr. 59).

"Even though the man doesn't have the records, he ought to have some records . . . ." (II-B Tr. 89).

"You have got to get together and have your proof ready or else acknowledge that you just haven't the proof."  
(II-B Tr. 92).

It was on the basis of these and similar remarks that petitioner concluded that it would be pointless to proceed further, and renewed his motion for a continuance (II-B Tr. 94). From this point on it was entirely clear, if it had not been before, that the Court's choice lay between granting petitioner's motion or dismissal. The Court denied petitioner's motion in unequivocal language:

". . . (T)he request for a continuance should be and is denied . . . "  
(II-B Tr. 101).

After this ruling, a curious exchange took place. The Court asked counsel for respondent what efforts had been made to obtain proof of facts from petitioner prior to trial (II-B Tr. 103). Petitioner's counsel asked whether the motion for a continuance was still under consideration (II-B Tr. 103-



104). The Court answered:

"I have stated that I do not intend to do it and I do intend to affirm it, but I am trying to pull together the threads here that will provide additional support for the reasonableness of my action." (II-B Tr. 104).

In other words, the Court at least from that point on was interested not in ascertaining facts upon which to reach a reasoned decision, but only in making a record to support a decision it had already made.

The next procedural event was respondent's motion to dismiss the case for lack of prosecution (II-B Tr. 112).

"What constitutes 'failure to prosecute,' of course, depends on the facts of the particular case, and the Court should consider all the pertinent circumstances in exercising its discretion." 5 Moore, Federal Practice 1119 (2nd Edition, 1964). (The author was discussing the analogous rule of the Federal Rules of Civil Procedure, Rule 41(b).) Cases in which grants of dismissals were held to constitute abuses of discretion include Carnegie National Bank v. City of Wolf Point, 110 F.2d 569 (9th Cir. 1940) and Thomas v. Commissioner, 185 F.2d 851 (6th Cir. 1950).

In view of the Court's last quoted comment (and see similar comments at II-B Tr. 107 and 108), it is obvious that the Court did not "consider all the pertinent circumstances." In arguing respondent's motion to dismiss, counsel for both



sides were addressing themselves to a mind already closed.

Had the Court objectively considered the facts of record, it might have concluded that the vast blocks of unexplained time during which, according to respondent (II-B Tr. 109-111) no documentation of deductions had been presented to agents of the Internal Revenue Service simply did not exist. Petitioner was first approached by the Service in April of 1961 (II-B Tr. 109). At least a few potential issues were settled between then and December of 1963 (II-B Tr. 117), during which period petitioner was working nights and weekends (I-B Tr. 79) in his efforts to rebuild the fortune he had once had and lost (II-B Tr. 38, 44). (We are not, of course, here concerned with the business acumen which petitioner may or may not have demonstrated in his efforts to rebuild his fortune. The pertinent point for purposes of this appeal is only that he was extremely busy, not whether his efforts were wisely directed.) From December of 1963 until shortly before he moved to Sacramento and began his duties as Budget Analyst for the Legislature, the time that he felt he could devote to this case was necessarily given over to the preparation of documents for filing in the Tax Court (I-A Tr. 1, 23, 28).

Whether the Court could have considered all of these facts, and, in the proper exercise of its judicial discretion, still denied petitioner's motions for continuance and granted respondent's motion for dismissal is a question this Court





need not decide. A careful reading of the transcript leaves no doubt that the Tax Court did not do so. Petitioner's contentions were not given the unbiased attention and the Tax Court's decision did not reflect the careful judgment to which petitioner was entitled.

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CONCLUSION

Petitioner submits that the judgment of dismissal should be reversed and the case returned to the Tax Court with instructions that it be set for trial.

Dated, Oakland, California,

February 11, 1966

Respectfully submitted,

JOHNSTON & PLATT

By ROBERT D. PLATT  
Attorneys for Petitioner

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT D. PLATT  
Attorney for Appellant



## CERTIFICATE OF MAILING

I, the undersigned, declare under penalty of perjury:

That I am a citizen of the United States, over the age of 18 and not a party to the within cause or proceeding; that I am an employee of Alameda County and my business address is 833 First Western Building, Oakland, California; that I served a true copy of the attached Petitioner's Opening Brief by placing said copy in an envelope addressed to: JOHN B. JONES, JR. and RICHARD M. ROBERTS, Acting Assistant Attorney General, Tax Division, United States Department of Justice, Washington, D.C. 20530

which envelope was then sealed and postage fully prepaid thereon, and thereafter, on the date set forth below, deposited in the United States mail at Oakland, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.)

Executed at Oakland, California, this 11th day of February, 1966

  
ROBERT D. PLATT



FEB 14 1967

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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EDWIN JONES MONTGOMERY, SR., and  
DOROTHY SCOTT MONTGOMERY,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

---

ON PETITION FOR REVIEW OF THE ORDER OF THE

TAX COURT OF THE UNITED STATES

---

BRIEF FOR THE RESPONDENT

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RICHARD M. ROBERTS,  
Acting Assistant Attorney General.

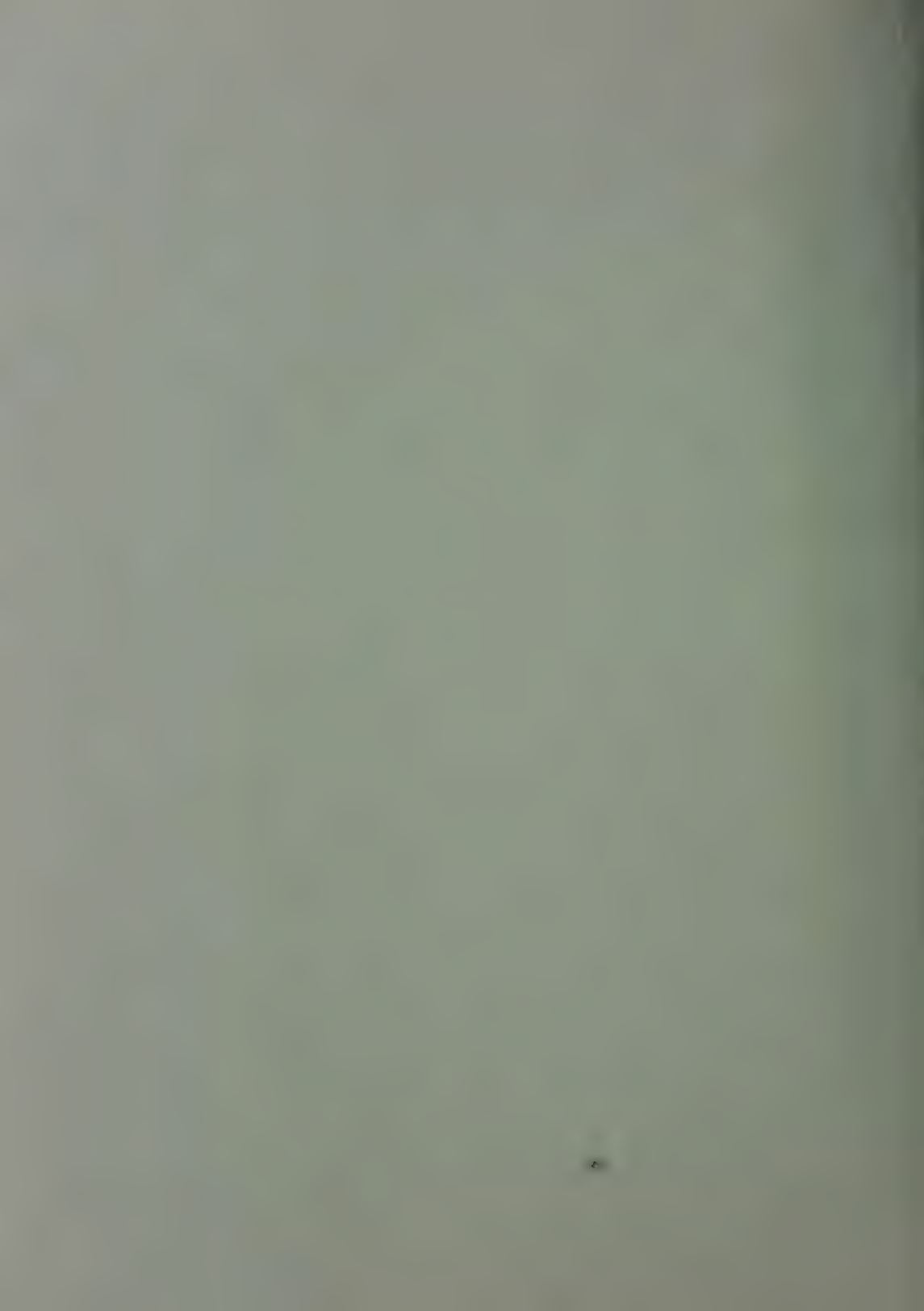
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Washington, D. C. 20530.

FILED

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WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

No. 20,451

EDWIN JONES MONTGOMERY, SR., and  
DOROTHY SCOTT MONTGOMERY,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

---

ON PETITION FOR REVIEW OF THE ORDER OF THE  
TAX COURT OF THE UNITED STATES

---

BRIEF FOR THE RESPONDENT

---

OPINION BELOW

The Tax Court wrote no opinion, but filed an order of dismissal (I-A R. 71)<sup>1/</sup> and an order denying a motion to set aside the order of dismissal (I-A R. 72).

JURISDICTION

This petition for review (I-A R. 84-85) involves federal income taxes for the taxpayer's calendar years 1957 through 1960. By his notice of deficiency mailed on December 12, 1963 (I-A R. 7), the Commissioner determined deficiencies for the taxable years in the amounts as follows (I-A R. 7):

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<sup>1/</sup> "I-A R." references are to volume I-A of the transcript of proceedings; and "II-B R." references are to volume II-B of the transcript of proceedings. Except for the first four pages of volume II-B, the pages are numbered chronologically. The first four pages will be referred to as "II-B, Hearings, May 27, 1964, p. \_\_\_\_".

<u>Year</u>	<u>Amount</u>
1957	\$1,175.27
1958	1,610.16
1959	4,093.05
1960	2,637.47

Within ninety days and on March 6, 1964, taxpayer filed a petition for redetermination with the Tax Court, pursuant to Section 6213 of the Internal Revenue Code of 1954. (I-A R. 1-6.) In response to the petition, the Commissioner, on April 17, 1964, filed a motion to dismiss for failure properly to prosecute. (I-A R. 20, 21.) Thereafter, on May 25, 1964, the taxpayer filed an amendment to his petition. (I-A R. 23-27.) At the hearing on the Commissioner's motion to dismiss held on May 27, 1964 (II-B, Hearing, May 27, 1964, pp. 1-4), the Tax Court ruled that the such amendment did not cure the defects in the petition and ordered, on or before August 20, 1964, the filing of a proper amended petition, or the showing of cause why the petition should not be dismissed for failure properly to prosecute (I-A R. 32). Pursuant to the order, taxpayer, on August 18, 1964, filed an amended petition. (I-A R. 33-40.) The order of dismissal (I-A R. 71) of the Tax Court was entered on April 15, 1965, and on May 12, 1965, the Tax Court entered its order denying taxpayer's motion to set aside the order of dismissal (I-A R. 72). Within the three month period prescribed in Section 7483 of the Internal Revenue Code of 1954, the taxpayer, on July 12, 1965, filed a timely petition for review. (I-A R. 84-85.) On August 12, 1965, venue for review of the order of dismissal and decision by this Court with respect to the taxable year 1957 was stipulated by the parties pursuant to Section 7482(b)(2) of the Internal Revenue Code of 1954.



(I-A R. 98.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

#### QUESTIONS PRESENTED

Whether, under the record before it, the Tax Court abused its discretion (a) in denying the taxpayer's motions for continuance when it appeared that the taxpayer, having had ample time, exercised not the slightest diligence in the marshalling of any evidence necessary to sustain his burden, (b) in granting the Commissioner's motion to dismiss for lack of prosecution when the taxpayer refused to go forward with the proceeding, and (c) in denying the taxpayer's motion to set aside the order of dismissal.

#### RULES INVOLVED

The applicable rules of practice of the Tax Court are set forth in the Appendix, infra.

#### STATEMENT

This petition for review presents to this Court for decision the question whether the Tax Court committed reversible error by abusing its discretion in denying taxpayer's motions for continuance, by granting the Commissioner's motion to dismiss for lack of prosecution, and through its refusal to set aside the order of dismissal at the instance of the taxpayer.

Edwin Jones Montgomery, Sr., and Dorothy Scott Montgomery, husband and wife, reside in Ormsby County, Nevada. (I-A R. 33.) Mrs. Montgomery's interest herein arises only because she filed joint returns with Mr. Montgomery who will hereinafter be referred to as the "taxpayer".

Individual income tax returns for the taxpayer's taxable years 1958-1960 were filed with the District Director of Internal Revenue in San Francisco, California, and for the taxable year 1957, his individual return was filed with the District Director of Internal Revenue in Detroit, Michigan. (I-A R. 33-34, 54.)

During the years involved in this proceeding the taxpayer, an engineer, the holder of two college degrees, a teacher and mathematics instructor (II-B R. 36-37), was a full time salaried employee of a series of employers (II-B R. 52, 69-70).<sup>2/</sup> "In addition to this", as taxpayer's counsel explained, "Mr. Montgomery in an effort to make every dime he possibly could, \* \* \* worked weekends and nights as a sort of freelance engineer or salesman." (II-B R. 69-70.) It was in connection with the latter alleged activities that taxpayer sought, without substantiating his right so to do, to deduct from his overall gross income large amounts as business expenses<sup>3/</sup> which resulted in claims of substantial business losses. (I-A R. 8.) For each of the

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2/ The nature of these employments was not established with precision at the hearing. Taxpayer's counsel explained to the Court (II-B R. 59): "Your Honor, may I just say that Mr. Montgomery has worked at a great many places and for a great many different people over the course of the years in question, and one of the problems we have is that he simply cannot recall now exactly what dates he worked and exactly what places."

3/ Below, Government counsel, in the presence of taxpayer and his counsel described to the Tax Court the effect of this practice. Without contradiction, it was pointed out with reference to the years 1950 to 1960 (II-B R. 20):

Examination of all returns for years '50 to '60 will show that in various years Petitioner has claimed he has been in various businesses. In these businesses he reports less than \$50.00 of income but more than \$5,000 of expenses. He does this year after year.

(Continued on following page.)



years in issue, taxpayer also claimed depreciation on rental property without establishing the depreciable basis thereof (I-A R. 9, 10, 12, 15), and, in two of such years, without substantiation, claimed deductions for repairs and a casualty loss resulting from fire (I-A R. 12, 15). In two of the years before the court, taxpayer claimed, also without substantiation, deductions for casualty losses resulting from theft and an automobile accident. (I-A R. 8, 12.) And in 1960 taxpayer deducted \$31,500 as a loss resulting from the worthlessness of certain bonds without establishing their basis or the year in which they became worthless. (I-A R. 15.)

This case has been under investigation since November 9, 1959, and although investigating revenue agents made numerous attempts to obtain substantiating evidence between that date and December 12, 1963, the date the notice of deficiency was mailed, the taxpayer failed to produce such evidence. (I-A R. 61-62.) At least as early as April 4, 1961, and more than four years before the hearing below, the Internal Revenue Service wrote to taxpayer concerning the substantiation of the deductions here in issue. (II-B R. 109-110.) In a series of letters to the Internal Revenue Service beginning at least as early as July 15, 1962, taxpayer asserted variously that it would be difficult for him to substantiate his case because his records were burned or destroyed and that, if given a little more time, he would produce such substantiating records and evidence. (II-B R. 4.)

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3/ (Continued from preceding page.)

The tax consequence of the deduction of these alleged business expenses is startling. While taxpayer earned gross income in full time employment in the form of salary in amounts averaging approximately \$12,000 per year, the total amount of his federal income tax payments during those years was just over \$800, excepting an additional amount paid in settlement of a previous tax dispute relating to the years 1952, 1953, 1955, and 1956. (II-B R. 19.)

On May 20, 1963, at a conference with Appellate Division representatives, taxpayer was orally advised of the precise character of the evidence necessary to substantiate the deductions claimed on his returns. Shortly thereafter the Appellate Division advisor corresponded with taxpayer, detailing with great specificity precisely the type of evidence required. The letter also advised taxpayer that he would be allowed ninety days from June 1, 1963, within which to produce the substantiating records and evidence which had not been forthcoming during the previous three years. The letter explained to the taxpayer that unless such substantiation was produced within that period the Internal Revenue Service would be without recourse other than to issue a statutory notice of deficiency. In point of fact, a period of more than six months was extended to the taxpayer for such purpose. (II-B R. 4-5; I-A R. 62.) Finally, on December 12, 1963, the Commissioner issued a deficiency notice which made the following adjustments with respect to taxpayer's unsubstantiated claims (I-A R. 7-17):

<u>Unallowed deductions</u>	<u>1957</u>	<u>1958</u>	<u>1959</u>	<u>1960</u>
Business loss	\$3,584.53	\$6,588.03	\$19,792.36	\$2,584.99
Rents - (1) Depreciation	1,000.00	1,000.00	1,000.00	1,000.00
(2) Repairs			1,140.00	675.00
(3) Fire loss				2,400.00
Casualty loss	1,300.00		600.00	
Medical expense	183.40	303.84		414.76
Capital loss				3,800.14

Acting pro se, the taxpayer on March 6, 1964, filed a petition for a redetermination of the deficiencies set forth in the Commissioner's notice. (I-A R. 1-17.) In his petition taxpayer averred under oath that (I-A R.5):

The normally available records to substantiate all of the items disallowed were destroyed by fires. The fact of the fires was clearly established and it was shown that the Petitioners required a considerable time to gather substantiating evidence. (Emphasis supplied.)

However, taxpayer failed to allege any facts which would substantiate the numerous deductions claimed on his returns. Accordingly, a motion was filed by the Commissioner seeking the dismissal of the proceedings for failure to state any relevant facts to sustain the assignments of error alleged in the petition. (I-A R. 20-21.)

Hearing on the motion was set for May 27, 1964, and notice thereof was given to the parties. (I-A R. 22.) Prior to the hearing, and on May 25, 1964, taxpayer filed an answer to the Commissioner's motion to dismiss and also an amendment to his allegedly defective petition. (I-A R. 23-30.) At the hearing, which was not attended by the taxpayer, the Tax Court concluded that the original petition failed to allege substantiating facts, but merely "vituperations against people in the Revenue Service." (II-B, Hearing, May 27, 1964, p. 4.) The Tax Court also concluded that the amendment to the petition did not cure the defects set forth in the motion. (I-A R. 32.) In keeping with the Commissioner's suggestion (II-B, Hearing, May 27, 1964, p. 2), however, the Tax Court refrained from dismissing the petition and by its order directed the taxpayer to file a proper amended petition by August 20, 1964, setting forth appropriate facts, or to show cause on August 26, 1964, why the case should not be dismissed for failure properly to prosecute. (I-A R. 32.) Thereafter, taxpayer retained counsel who prepared and, on August 18, 1964, filed an amended petition (I-A R. 33-51) which resulted in the discharge of the order to show cause (I-A R. 52<sup>4/</sup>). Issue was joined on September 17, 1964, upon the filing of the Commissioner's answer to the amended petition (I-A R. 54-55), and, 4/ Counsel did not actually enter their appearance until September 4, 1964. (I-A R. 53.)



on December 30, 1964, the case was set for hearing in San Francisco on April 5, 1965 (I-A R. 56).

Under date of March 1, 1965, counsel for taxpayer filed a motion to continue the case to the Fall Session of the Tax Court, asserting as grounds therefor taxpayer's preoccupation as budget analyst for the Nevada legislature and his inability to spare the several days which would be necessary to travel to Tucson, Arizona, and Sacramento, California, to sort out records stored in those locations which would be necessary to establish the deductions at issue. (I-A R. 57-58.) And under penalty of perjury taxpayer on March 24, 1965, filed a declaration to the same purport in support of the motion. (I-A R. 67-68.) In opposition to the motion for continuance a notice of objection was filed averring the long and fruitless attempts to obtain from taxpayer evidence in support of the deductions in issue and, in particular, the contradictory statements made under oath by the taxpayer in the original petition that "The normally available records to substantiate all of the items disallowed were destroyed by fires" and the claimed existence of such records in Tucson and Sacramento. (I-A R. 61-66.)

Following its consideration of taxpayer's refusal over a period of five years to produce any evidence in substantiation of the deductions in issue and his contradictory assertions as to the availability of such evidence, the Tax Court denied the taxpayer's motion for continuance (II-B R. 8) for the reason that (II-B R. 9):

The statement here is that simply the man is too busy to come down here. That is what it amounts to. He has been notified since last December that this case is going to be set today and it is up to him to make arrangements.

The Tax Court continued (II-B R. 10):

There have been so many intermediate motions and petitions and the like and I can't see that there is any real basis except that the gentleman--he is not engaged in a trial or anything, he is working over in the Legislature, apparently, as assistant counsel, and he must be able to arrange his personal affairs. I think if we put it off it is going to be the same thing when it comes up again, and I don't think to continue it would serve any purpose.

Thereupon, the Tax Court set the trial of the cause for April 7, 1965.

(II-B R. 10-11.)

On April 7th and 8th, 1965, the case proceeded to trial, and after several hours of inconclusive testimony by the taxpayer during which "not one iota of evidence" (II-B R. 88, 114-115) with regard to any of the questioned items was adduced counsel for the taxpayer was warned that the burden of establishing the case was his (II-B R. 84, 87).

Thereupon counsel for the taxpayer renewed his ~~objection to the granting~~ *motion for a continuance* of the Commissioner's motion and the Tax Court announced--after stating that it had considered the written motion for continuance, the written objection thereto and the oral colloquy of counsel--its adherence to its prior ruling. (II-B R. 94-101.)

Following counsel's refusal to present further evidence on behalf of the taxpayer (II-B R. 102-103, 113), the Tax Court commented on taxpayer's refusal to stipulate the simple facts of the case and stated that there "have been indications that there have not been efforts to properly prepare the case or diligently get this matter out" (II-B R. 104). In this connection, the court invited the taxpayer to explain the apparent lack of diligence in the preparation. (II-B R. 104,

108-109.) Although taxpayer was physically in the courtroom (II-B R. 112), counsel did not seek to adduce his explanation for his dilatory conduct. In explanation, however, counsel stated on taxpayer's behalf that the failure to produce substantiating records was occasioned by the latter's compulsion to work abnormally long hours and his feeling that over the years the deadlines imposed by the Internal Revenue Service with respect to the records sought were too immediate. (II-B R. 116-117.) Upon the Commissioner's oral motion that the case be dismissed for lack of prosecution (II-B R. 112), the Tax Court on April 15, 1965, reluctantly dismissed the proceedings and sustained the deficiencies as determined by the Commissioner (I-A R. 71, II-B R. 120).

On May 10, 1965, counsel for the taxpayer filed a motion to set aside the order of dismissal together (I-A R. 72-77) with a supporting affidavit (I-A R. 78, 81) in which taxpayer alleged that it had been impossible for him to obtain the substantiating records under consideration because a financial disaster which occurred in 1950 made it necessary for him to spend virtually all of his time in trying to reestablish his erstwhile financial position, and because a fire had destroyed some of his records. Denial of this motion was made on May 12, 1965. (I-A R. 72.)

#### SUMMARY OF ARGUMENT

The Tax Court did not, under the circumstances disclosed by the record, abuse its discretion in denying taxpayer's motions for continuance, in granting the Commissioner's motion to dismiss, and in denying the taxpayer's motion to set aside the order of dismissal.



The granting or denial of a continuance after issue is joined is a matter strictly within the discretion of the trial court. The same is true of the grant or denial of a motion to dismiss for failure to prosecute and the grant or denial of a motion to set aside an order of dismissal. The trial court's action in any such matter will not be overruled by an appellate court unless there has been a clear abuse of that discretion.

Lack of preparation is not a ground for obtaining a continuance unless there is a valid reason for such lack. Where it appears that a party has not had time to prepare for trial, a continuance will be granted; but where, as here, a party who might have been prepared for trial will very seldom be granted a continuance because, for reasons of his own convenience, he is not prepared. In such a case it is clear that the exercise of the trial court's discretion will not be disturbed. Having rightfully denied the taxpayer's requests for a continuance, it was not, under the circumstances, an abuse of discretion for the Tax Court to dismiss the proceedings for want of prosecution. Not to have done so would have rendered meaningless its previous action. Similarly, the Tax Court did not abuse its discretion in denying taxpayer's motion to set aside its order of dismissal. In this case, the only basis for such a motion is that its previous actions involved an abuse of discretion, which they did not.

ARGUMENT

THE TAX COURT DID NOT ABUSE ITS DISCRETION IN DENYING TAXPAYER'S MOTIONS FOR CONTINUANCE AND IN GRANTING THE COMMISSIONER'S MOTION TO DISMISS FOR LACK OF PROSECUTION; NOR DID THE TAX COURT ABUSE ITS DISCRETION IN DENYING TAXPAYER'S MOTION TO SET ASIDE THE ORDER OF DISMISSAL

The taxpayer charges the Tax Court with abuse of discretion in denying his motions for continuance and thereafter in granting the Commissioner's motion to dismiss for failure to prosecute and in denying his motion to set aside the order of dismissal. For these reasons it is urged that the order of dismissal be reversed and that the case be remanded to the Tax Court with instructions that it be set for trial. We submit that there is no merit to the taxpayer's contentions with respect to any of the Tax Court's actions since each such action involved no abuse of that body's discretion. We fully agree with the taxpayer (Br. 7) that the fundamental question the Tax Court had to answer was whether the taxpayer should have been given more time to prepare his case. We apprehend also that the answer to this question is decisive of each of the errors alleged on this appeal since each alleged error is grounded solely upon the Tax Court's alleged abuse of discretion in denying taxpayer's motions for a continuance. Vevelstad v. Flynn, 230 F. 2d 695 (C.A. 9th), certiorari denied, 352 U.S. 827; United States v. Pacific Fruit & Produce Co., 138 F. 2d 367 (C.A. 9th); Hicks v. Bekins Moving & Storage Co., 115 F. 2d 406 (C.A. 9th); Sweeney v. Anderson, 129 F. 2d 756 (C.A. 10th); Grunewald v. Missouri Pacific Railroad Co., 331 F. 2d 983 (C.A. 8th). Moore, Federal Practice (2d ed.), par. 41.11, p. 1125.

A consideration of the applicable law and the peculiar facts of this case makes it plain that the denial by the Tax Court of the taxpayer's motion for a continuance was based upon established considerations of fairness, justice and sound judicial administration. It is universally accepted that the grant or denial of a motion for a continuance is within the sound discretion of the trial court, and on appeal the applicable standard is that of the presence or absence of abuse. United States v. Pacific Fruit & Produce Co., *supra*; Duisberg v. Markham, 149 F. 2d 812 (C.A. 3d); Woodbury v. Commissioner, 231 F. 2d 121 (C.A. 3d); Golding v. United States, 219 F. 2d 109 (C.A. 4th); Girard Trust Co. v. Amsterdam, 128 F. 2d 376 (C.A. 5th); Scholl v. Felmont Oil Corp., 327 F. 2d 697 (C.A. 6th); Andrews v. Hotel Sherman, 138 F. 2d 524 (C.A. 7th); Grunewald v. Missouri Pacific Railroad Co., 331 F. 2d 983 (C.A. 8th); Baltimore American Ins. Co. v. Pecos Mercantile Co., 122 F. 2d 143 (C.A. 10th); Bressler v. Bressler, 274 F. 2d 91 (C.A. D.C.). Discretion indicates the absence of a hard and fast rule. Langnes v. Green, 282 U.S. 531, 541. A request for a continuance, as here, because of inadequate preparation is subject to these principles. Hicks v. Bekins Moving & Storage Co., 115 F. 2d 406 (C.A. 9th); United States v. Pacific Fruit & Produce Co., 138 F. 2d 367 (C.A. 9th); Sweeney v. Anderson, 129 F. 2d 756 (C.A. 10th); Everts v. Will S. Fawcett, Co., 3 Cal. App. 2d 261, 38 P. 2d 868.

Neither party to a law suit, of course, should be forced to trial before he has an adequate opportunity to investigate the facts and to prepare his case. However, the proper administration of the judicial process requires the elimination of unnecessary delay in the trial of



cases and the prompt dispatch of judicial business. The trial courts must and do have broad discretion in managing their calendars and in holding litigants to assigned dates in order to facilitate the orderly trial of cases before them in view of the limited judicial manpower and court officials available. Janousek v. French, 287 F. 2d 616, 623 (C.A. 8th); Sweeney v. Anderson, supra, p. 758. This Court long since made clear the litigant's responsibility in Hicks v. Bekins Moving & Storage Co., supra, p. 409, in its quotation from Inderbitzen v. Lane Hospital, 17 Cal. App. 2d 103, 106, 61 P. 2d 514, 516:

The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination, and unless it is made to appear that there has been a gross abuse of discretion on the part of the trial court in dismissing an action for lack of prosecution its decision will not be disturbed on appeal. (Emphasis supplied.)

Here, the taxpayer's posture is the antithesis of the requirement clearly stated in the Hicks case. While want of preparation of a litigant's case may, upon a showing of some precise legal or strong equitable reason, constitute a ground for a continuance, such is not the case when such an absence of preparation is coupled with the negligence, indifference, lack of diligence and ambivalence of position manifested by the instant taxpayer. As the record shows, for a period of about five years prior to the conduct of the proceedings below, the Internal Revenue has exercised every effort to obtain from the taxpayer evidence to substantiate large deductions claimed by him. Thus, in letter after letter (II-B R. 4, 106, 109) the Internal Revenue Service solicited the taxpayer's production of records or other evidence to substantiate his claims. And to these queries taxpayer responded

contradictorily that the supporting records were burned or destroyed and that, should a little more time be extended, they would be made available.

(II-B R. 4.) In his original petition (I-A R. 1-17) taxpayer averred under oath that "The normally available records to substantiate all of the items disallowed were destroyed by fires" (I-A R. 5). In point of fact, however, the probabilities are that only a small portion of the supporting records for the years at issue were consumed in a fire which occurred on March 24, 1959. (I-A R. 79.) Clearly, records relating to transactions after that date were not destroyed as stated. Thus records relating to the years 1959 and 1960 should have been intact. And, in view of the date of the fire and the filing date of the 1958 return, there would appear a strong probability that records sufficient to serve as a basis for the detailed deductions claimed for that year were spared as well. In any event, between the time that the audit of the first of the years in issue took place in 1959 (I-A R. 61-64) and the date of the hearing in 1965, taxpayer had ample <sup>5/</sup> time to assemble or reconstruct his supporting records.

Although taxpayer did not retain counsel until July, 1964 (I-A R. 73), he was fully advised of the nature of the evidence required to support his claim, both orally at conference on May 20, 1963

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5/ At the hearing, taxpayer claimed he was unable to produce supporting records. Yet, on his 1960 income tax return he claimed as a business deduction on Schedule C several hundred dollars of business expenses with the following explanation (II-B R. 22, Ex. 4-D):

The major business activity was intensive work replacing burned records of previous business activities in Pennsylvania and Arizona as demanded by the Internal Revenue Service. This involved extensive correspondence, long distance telephone calls and Several (sic) trips. Trips to I. R. S. office in San Francisco were necessitated.

(II-B R. 4), and, shortly thereafter, by detailed written advice (II-B R. 5).<sup>6/</sup> Nor was he placed under undue pressure to produce such evidence. To the contrary, although taxpayer was at long last notified in writing that unless he produced in ninety days the evidence he had failed to produce during the several preceding years, a statutory notice of deficiency would issue (II-B R. 5), more than six months were permitted to expire before the notice actually issued on December 12, 1963.

The chronology of the case, particularly in view of its tortuous background and the indefinite continuance sought, also demonstrates that the taxpayer was not rushed to trial. More than nine months passed between the mailing in December, 1963, of the statutory 90-day letter (I-A R. 7-17), which in great detail set forth the position of the Commissioner, and the filing of the Commissioner's answer to taxpayer's amended petition (I-A R. 33-40) on September 17, 1964. In July 1964, taxpayer retained counsel of exceptional competence, and on December 30, 1964, the trial was set for April 5, 1965. Thus, after several years of opportunity to marshal evidence to support his deductions prior to the filing of the statutory notice, there remained to the taxpayer almost sixteen months more in which to substantiate his case. Moreover, although the reasonable opportunity to prepare for trial pertains to the litigant and not to his attorney (Miller v. Johnson, Inc., 191 Va. 768, 62 S.E. 2d 870; Brunson v. Hamilton Ridge Lumber Co., 122 S.C. 436, 115 S.E. 624; Berger v. Mantle, 18 Cal. App. 2d 245, 63 P. 2d 335) counsel had more than eight months for preparation.

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<sup>6/</sup> That taxpayer was not uninformed in this matter is made clear by the fact that he was involved in similar proceedings in the Tax Court for the years 1952, 1953, 1955 and 1956. (II-B R. 7.) In that proceeding, which was ultimately settled, taxpayer sought and was granted two continuances.



Under the record before it it is difficult to perceive how the Tax Court could have concluded other than that the taxpayer had ample time to prepare his case. It is true that the Tax Court could have in its discretion at the hearings on April 5 or April 7 and 8, 1965, or at any time prior thereto, granted any continuance which it felt to be reasonable. Cf. Bedgisoff v. Cushman, 12 F. 2d 667 (C.A. 9th). But it properly refrained from doing so in view of the startling and protracted display of dilatory conduct and complete lack of diligence on the part of the taxpayer. Nor should the taxpayer's protestations of official duties and the need for substantial expenditures (I-A R. 67-68, 78-81) necessarily have compelled the Tax Court to grant the continuance. It is well established that official duties of a far higher character than those here involved and the necessity of expenditures of a similar magnitude need not lead to the grant of a continuance of judicial proceedings. Sweeney v. Anderson, 129 F. 2d 756 (C.A. 10th). Moreover, the true underlying causes of the alleged need for additional time for preparation involve duty and expense not at all. As taxpayer's counsel candidly explained (II-B R. 116-117), during the time when the taxpayer should have pursued diligently the preparation of his case he was under a compulsion to work abnormally long hours to reestablish a lost fortune, "to work perhaps toward a pie in the sky \* \* \*." He felt--over a period of about five years--that he had never been given sufficient time to gather his evidence.

Lack of preparation is not a ground for obtaining a continuance unless there is a valid reason for such lack. Manifestly, an unfettered compulsion to utilize all of one's time to establish a fortune

is not such a reason. No more is a supposed lack of time to gather evidence such a reason when time in the magnitude of five years was available. As was observed by this Court in United States v. Pacific Fruit & Produce Co., 138 F. 2d 367, 372:

Where it appears that a party has not had time to make adequate preparation for trial, a continuance will be granted, but a party who might have been prepared for trial will very seldom be granted a continuance because he is not prepared, and certainly in such a case the exercise of the court's discretion will not be disturbed.

It is well settled that a court has inherent power to dismiss a civil case for lack of prosecution. Link v. Wabash Railroad Co., 370 U.S. 626; United States v. Pacific Fruit & Produce Co., supra; Hicks v. Bekins Moving & Storage Co., 115 F. 2d 406 (C.A. 9th); Janousek v. Wells, 363 F. 2d 118 (C.A. 8th); Grunewald v. Missouri Pacific Railroad Co., 331 F. 2d 983 (C.A. 8th). Dismissal under such circumstances is a matter of discretion. As the Supreme Court indicated in the Link case, supra, 370 U.S., p. 633:

Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion.

Here, following the Tax Court's denial of taxpayer's motion for continuance, the taxpayer refused to proceed further with the presentation of his case. (II-B R. 102.) Necessarily, having rightfully denied taxpayer's request for a continuance, it was not, under the circumstances, an abuse of discretion for the Tax Court to grant the Commissioner's motion to dismiss for want of prosecution. Vevelstad v. Flynn, 230 F. 2d 695 (C.A. 9th); United States v. Pacific Fruit & Produce Co., supra; Hicks v. Bekins Moving & Storage Co., supra; Sweeney v.

Anderson, 129 F. 2d 756 (C.A. 10th). To have done otherwise could have done no other than vitiate the substance of its order of denial.

Nor do we perceive any abuse of discretion in the Tax Court's denial of the motion to set aside the order of dismissal. The Tax Court unquestionably can grant a rehearing for good cause shown. But, as in the case of a continuance after issue is joined and a dismissal for lack of prosecution, the granting or denial of a rehearing or new trial is within the sound discretion of the trial court and its action in such matters should not be overruled in the absence of a clear abuse of discretion. With respect to such motions, and other similar intermediate proceedings before the trial court, the Supreme Court said in Wright v. Hollingsworth, 1 Pet. 164, 168, where an amendment to the complaint had been allowed:

But the allowance and refusal of amendments in the pleadings, the granting or refusing new trials, and indeed, most other incidental orders made in the progress of a cause, before trial, are matters so peculiarly addressed to the sound discussion [sic] of the courts or original jurisdiction, as to be fit for their decision only, under their rules and modes of practice. This, it is true, may, occasionally, lead to particular hardships; but on the other hand, the general inconvenience of this court attempting to reverse and correct all the intermediate proceedings in suits, between their commencement and final judgment, would be intolerable. This court has always declined interfering in such cases; accordingly, it was held by the court, in Wood v. Young, 5 Cranch 237, that the refusal of the court below to continue a cause, after it is at issue, is not a matter upon which error can be assigned; that the refusal of the court below to grant a new trial, is not a matter for which a writ of error lies, 5 Cranch 11, 187, and 4 Wheat. 220; and that the refusal of the court below, to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as a cause of reversal on a writ of error. We can perceive no distinction in principle



between these cases, and the one before the court. We must take the declaration, including the amendment, as we find it on the record. Nor can we interfere, because the court below did not, as it ought, require the costs formerly accrued, to be paid, as a condition of the amendment.

See also Hicks v. Bekins Moving & Storage Co., supra; Vevelstad v. Flynn, supra.

The grounds on which a trial court may grant a rehearing, reconsideration or new trial in its discretion are many and varied. The most usual grounds for granting a new trial are newly discovered evidence, changes in the law, changes in the facts, errors in the admission or exclusion of evidence where the decision is contrary to law or not supported by the evidence, and the like. But when the record in this case is considered in the light of the grounds upon which a rehearing or new trial will ordinarily be granted, it is clear that the Tax Court did not abuse its discretion in denying the request to set aside the order of dismissal. The only basis for such request in this case is that the Tax Court abused its discretion in refusing to grant the taxpayer's motions for a continuance and in granting the Commissioner's motion to dismiss. We have demonstrated above that the Tax Court's actions in those instances were fully warranted. No more did its refusal to set aside the order of dismissal constitute an abuse of discretion, since the sole grounds for such action would be an abuse of discretion in respect of the previous motions. Moreover we entertain serious doubts that an appeal would lie from the Tax Court's order denying the motion to set aside the order of dismissal. Hicks v. Bekins Moving & Storage Co., supra, p. 409.

To sustain its contention that the Tax Court erred in failing to grant its motion for a continuance, the taxpayer cites (Br. 9) Alamance Industries, Inc. v. Filene's, 291 F. 2d 142 (C.A. 1st), and asserts that it "provides some analogy to the present case." Other than involving a motion for a continuance, that case provides no analogy at all and is markedly distinguishable on its facts. In like vein taxpayer relies (Br. 13) upon Carnegie Nat. Bank v. City of Wolf Point, 110 F. 2d 569 (C.A. 9th), and Thomas v. Commissioner, 185 F. 2d 851 (C.A. 6th), as establishing his contention that the Tax Court erred in granting the Commissioner's motion to dismiss for failure to prosecute. Any reliance on these cases is misplaced. The Thomas case (p. 852) involved a bizarre instance of dismissal for failure to prosecute "due to the fact that counsel has no standing in this court \* \* \* and the taxpayer is not represented." The abuse found by the Sixth Circuit consisted not in the trial court's denial of a motion but in its denial of permission to counsel to file such a motion. In the Carnegie Nat. Bank case, this Court held that it was an abuse of discretion for one district judge, on his own motion, to dismiss a case in which another judge on the same court had already entered his decision. This Court reasoned (110 F. 2d, p. 573):

As the case stood, appellants had won the decision, but neglected to secure a decree thereon. To be summarily deprived of the fruits of victory now would appear a penalty so harsh that only extreme provocation would justify it.

Finally, the taxpayer suggests (Br. 13-15) that the Tax Court acted injudiciously in dismissing for failure to prosecute because it did not consider all the pertinent circumstances. This, simply,

is untrue. Rarely does a court display a greater mastery of the facts and circumstances of a case than is evinced by the instant record, particularly where the court summarized (II-B R. 94-122) the taxpayer's posture. Not only did the court consider all pertinent circumstances, it repeatedly invited counsel to present an explanation of such circumstances. (II-B R. 105, 108, 113, 114.) Counsel's initial apparent eagerness to accept these invitations (II-B R. 112) seems to have evaporated and the matter was dropped with the candid statement (II-B R. 116) that taxpayer over the years had simply been too busy rehabilitating his personal fortune to gather the evidence necessary to substantiate his deductions. Taxpayer here confesses appealingly his unwarranted lack of diligence over a protracted period and seeks to avoid the consequences thereof by announcing he is now ready to get on with his case. This Court has on more than one occasion answered this cavalier approach to the judicial process. Thus, in United States v. Pacific Fruit & Produce Co., 138 F. 2d 367, 372, this Court stated:

The appellant assures us that it "now has available competent evidence as to the market value of the 1937 crops." This preparedness comes tardily. In Hicks v. Bekins Moving & Storage Co., 9 Cir., 115 F. 2d 406, 409, we said: "Moreover, an order of dismissal may be granted, notwithstanding the plaintiff has been stirred into action by the impending dismissal, for subsequent diligence is no excuse for past negligence."



CONCLUSION

The action of the Tax Court in the instant case was proper and its decision is correct. The order of dismissal and decision should be affirmed.

Respectfully submitted,

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MARCH, 1966.

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: \_\_\_\_\_ day of \_\_\_\_\_, 1966.

\_\_\_\_\_  
Attorney

APPENDIX

Rules of Practice, Tax Court of the United States (Rev. 1958, 1964 ed.):

RULE 19. MOTIONS

\* \* \*

(b) Motions will be acted upon as justice may require and may, in the discretion of the Court, be placed upon the motion calendar for argument. Disposition of motions will be expedited if the party filing the same, after consultation with his adversary, is able to note on the motion that there is no objection thereto. (See Rule 27(a) and (d) and Rule 30(b).)

(c) The filing of a motion shall not constitute cause for postponement of a trial from the date set. (See also Rule 27(d) with respect to motions for continuance.)

\* \* \*

RULE 20. EXTENSIONS OF TIME

(a) An extension of time (except for the absolute time limit on filing of the petition, see section 6213(a), Code of 1954, and except as otherwise provided in these Rules) may be granted by the Court within its discretion upon a timely motion filed in accordance with these Rules setting forth good and sufficient cause therefor or may be ordered by the Court upon its own motion.

\* \* \*

RULE 21. DISMISSAL

A case may be dismissed for cause upon motion of either party or of the Court. (See Rule 7(a)(2) and Rule 27(c)(3).)

RULE 27. PLACE, TIME, AND NOTICE OF HEARINGS AND TRIALS--  
ATTENDANCE AND CONTINUANCES

\* \* \*

(d) Continuances--Motions--Trials.--

(1) Court action on cases set for hearing on motions or trial will not be delayed by a motion for continuance unless it is timely, sets forth good and sufficient cause, and complies with all applicable Rules.

\* \* \*

No. 20451

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EDWIN JONES MONTGOMERY, SR., et al.,  
Petitioner,  
vs.  
COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

# PETITIONER'S REPLY BRIEF

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FILED

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No. 20451

## In The

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DWIN JONES MONTGOMERY, SR., et al.,  
 Petitioner,  
 vs.  
 COMMISSIONER OF INTERNAL REVENUE,  
 Respondent.

# PETITIONER'S REPLY BRIEF

## SUMMARY OF ARGUMENT

The Tax Court exercised its "discretion" arbitrarily and willfully, rather than reasonably and with due regard for all of the circumstances, as required by law. Its decision should therefore be reversed, whether or not it could reasonably have arrived at the decision which it reached.

## ARGUMENT

A TRIAL COURT MUST EXERCISE ITS DISCRETION IN A  
LAWFUL MANNER; IT APPEARS FROM THE RECORD THAT  
THE COURT BELOW FAILED TO DO SO.

Almost all of respondent's brief is devoted to the proposition that granting of a continuance is a matter that falls within the trial court's discretion, and to argument that there are facts in the record





that could be said to justify the decision that the court reached. We agree with respondent upon the former point. We do not concede the latter, nor is it necessary, however, that we contest it. The point upon which we insist is that the scope of review on a discretionary ruling is broader than is implied by respondent's brief: an appellate court must reverse if it determines that the trial court in fact did not exercise its discretion in a lawful manner, even though, had the trial court done so, it could have arrived at the same decision.

The following remarks appear in an article dealing specifically with review of administrative decisions; the reasoning is nevertheless applicable to the present circumstances:

It is commonplace that in a given case the evidence may suffice to support a finding either way. The finding may be "against the weight of the evidence" and yet be valid because supported by "substantial" evidence. The factfinder must make a choice based on his own appreciation of the greater probability; and though it may not be clear from the authorities, I would suggest that the factfinder should believe that the fact is "true," rather than merely make an objective judgment of its probability. Finding a fact involves a personal commitment. Merely because the evidence is "substantial", it does not follow that the finder of fact has properly understood his obligation; and if it is evident that he has not, the case should be remanded to him despite the fact that the evidence is substantial. (Emphasis in original)

Jaffe, Administrative Law: Burden of Proof and Scope of Review, 79 Harv. L. Rev. 914, 915 (1966).

to paraphrase the last sentence of the foregoing passage in terms applicable to the present situation: even if there are facts of record upon which the court could have based a discretionary ruling adverse to



petitioner, it does not follow that the court has properly understood and ignored its obligation; and if it is evident that it has not, the case should be remanded despite the existence of such facts. To affirm where a reasonable man could, at trial, have decided the case either way, but where it appears that the trial court in question did not understand or did not perform its obligation properly, would be to deprive the litigant of a necessary step in the judicial process. Petitioner herein was entitled to have the question raised by his requested continuance decided by a judge exercising judicial discretion; it is that step of which he was deprived by the court below.

In Janousek v. French, 287 Fed.2d 616 (8th Cir. 1961), cited by respondent on page 14 of his brief, the court, at page 621, quoted from Howles v. Goebel, 151 Fed. 2d 671, 674 (8th Cir. 1945), the following description of the duty of an appellate court in reviewing an exercise of discretion:

. . . (T)he process of an appellate court in examining exercised discretion for abuse is not one of creating prescriptions and definitions for the curbing of judgment generally, but simply one of viewing the action taken in an immediate case in the relativeness of its entire situation to see whether it compels the conviction that there has not been a responsible exercise in a legal sense of official conscience on all the considerations involved in the situation. (Emphasis added)

To demonstrate that petitioner herein was deprived of the required "responsible exercise," it is first necessary that we discuss briefly what, in the judicial context, is meant by the term "discretion." Respondent has cited, on page 13 of his brief, the case of Langnes v. Green, 282 U.S. 531 (1931) in support of the proposition that "discretion indicates the absence of a hard and fast rule." The passag



upon which respondent relies goes on to define "discretion" as follows:

When invoked as a guide to judicial action it means a sound discretion, that is to say a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

282 U.S. at 541.

Judicial "discretion" has often been described in words of similar import; several definitions are set out in the Appendix, infra.

Did the Tax Court understand and honor its obligation to exercise discretion, as that term has been defined by the authorities cited above and in the Appendix? As petitioner has indicated in his opening brief, a careful reading of the record demonstrates that it did not. At a very early stage the court indicated that it had already decided that the taxpayer was engaging in dilatory tactics:

. . . I think if we put it off it is going to be the same thing when it comes up again . . . . (II-B Tr. 10).

This remark was made at a time when the record before the court showed, by written motion of petitioner's counsel (I-A Tr. 57) and by declarations under penalty of perjury of petitioner (I-A Tr. 67) and of the director of the bureau for which petitioner worked (I-A Tr. 69), that petitioner, in the months immediately preceding the trial, was working on a very heavy schedule, including nights and weekends, for the Nevada Legislature and accordingly had not been able to make necessary trips to Arizona and California to gather and organize relevant documentation. These facts were not directly controverted by respondent, who







contended himself with charges that petitioner had failed since 1959 to substantiate the deductions claimed, that petitioner was only trying to "delay and procrastinate," that petitioner had "successfully adopted the same delaying tactics in previous cases," and that the original and amended petitions filed by petitioner were false and defective (I-A Tr. 61-66, II-B Tr. 3-5).

Since the situation petitioner described clearly made it impossible for him to be ready for trial on the date in question (See petitioner's opening brief pages 8 and 9), and since petitioner's description of the situation was not controverted and respondent made no claim that delay would prejudice his case, a proper exercise of discretion would surely have resulted in the granting of a continuance at that time. The court's denial of petitioner's motion was not, however, as shocking a ruling as those which followed, since the court at this early stage may have believed that the choice lay between granting a continuance and forcing the petitioner to proceed on a make-shift basis with whatever evidence was immediately available. By the time the next ruling was made, however, the situation had altered: the court had made it clear that it was not going to accept the kind of proof petitioner was seeking to present, and petitioner had concluded that it would be pointless to proceed further. (See petitioner's opening brief page 12). The choice now facing the court was between continuance and dismissal.

It appears unequivocally from the record that the court did not consider this choice with an open mind; that its discretion was not



"directed by the reason and conscience of the judge to a just result," Langnes v. Green, 282 U.S. 531, 541 (1931), but rather was exercised "arbitrarily or willfully." Langnes v. Green, supra. On the last page of his brief, respondent finally meets petitioner's essential contention on this point with the statement that "rarely does a court display a greater mastery of the facts and circumstances of a case than is evinced by the instant record, particularly where the court summarized (II-B R. 94-122) the taxpayer's posture." (Respondent's brief, page 22.) The pages of the record referred to by respondent include petitioner's last renewal of his motion for continuance (II-B Tr. 94), respondent's motion for dismissal (II-B Tr. 112) and argument by counsel for both sides. (Petitioner's argument appears at II-B Tr. 102-3, 113-14, 116-17; Respondent's at II-B Tr. 103, 105-6, 109-11.) It is particularly noteworthy that, as pointed out in petitioner's opening brief at page 13, the court, in response to a question from petitioner's counsel, frankly stated that it was not at this time reconsidering the motion for a continuance, but was merely seeking to "provide additional support for the reasonableness" of its action (II-B Tr. 104). Having made this statement, the court went on to insist that the record with respect to the history of petitioner's dealings with the Internal Revenue Service be expanded (II-B Tr. 104-111).

The court's remark makes crystal clear that which was implicit in its remarks made two days earlier (See page 4, infra) and in remarks it made as the trial progressed (See Opening Brief, page 12)). The court made up its mind what it was going to do no later than within a



few minutes of taking the bench on the first day and never thereafter considered with an open mind the following facts: Petitioner had suffered a financial debacle (II-B Tr. 44) and felt compelled to work extraordinary hours to rehabilitate his position (I-A Tr. 79), many of petitioner's records had been destroyed in a fire (I-A Tr. 79, 82, 83), petitioner had moved twice during the period in question (I-A Tr. 80), petitioner was and had been for several months heavily involved in duties with the Nevada Legislature (I-A Tr. 57, 67, 69), for all of these reasons records which petitioner would need remained scattered and unorganized (I-B Tr. 102, I-A Tr. 80), but petitioner was prepared to spend his coming summer vacation in preparation for trial and would be ready for trial at the fall session of the court (II-B Tr. 102, I-A Tr. 72, 81).

An open-minded court, bearing in mind that "(1)iberality should be exercised in the granting of continuances to obtain the presence of material evidence and to prevent miscarriages of justice," Cohen v. Herbert, 186 Cal App. 2d 488, 493 (1960), might well have decided that, in this instance, the interests of justice would best be served by allowing petitioner the continuance he requested. Petitioner, having been denied the judgment of such a court, has been denied an essential step in the judicial process.

There is a factual inference in respondent's brief that is not warranted and should be corrected; respondent relies heavily upon alleged "contradictory statements" of petitioner about his records (Respondent's Brief pages 5, 6, 8, 15). Though some of petitioner's statements may have been inartfully worded, none of them are







inconsistent with the full explanation about the records: Records accumulated prior to the fire on March 24, 1959 were destroyed, and will have to be reconstructed through the records of others. Records accumulated since that fire were moved from Sacramento to Carson City in August of 1964 and were not, at the time of trial, organized in a manageable form. Still other records are in Arizona (I-A Tr. 79-80).

None of the authorities cited by respondent deal with petitioner's contention that the trial court must exercise its discretion in a lawful manner; all are illustrations of the point, which petitioner does not dispute, that a ruling on a continuance is discretionary. Suffice it to say that all of respondent's authorities are factually distinguishable from the case at bar. In each of the following cases, substantial prejudice was shown by the party opposing the continuance: Vevelstad v. Flynn, 230 Fed.2d 695 (9th Cir. 1956); United States v. Pacific Fruit & Produce Co., 138 Fed.2d 367 (9th Cir. 1943); Girard Trust Co. v. Amsterdam, 128 Fed.2d 376 (5th Cir. 1942).

In each of the following cases, previous continuances had been granted; in Sweeney v. Anderson, infra, a further continuance was offered but the litigant failed to respond to the offer: Sweeney v. Anderson, 129 Fed.2d 756 (10th Cir. 1942); Grunewald v. Missouri Pacific Railroad Co., 331 Fed. 2d 983 (8th Cir. 1964); Woodbury v. Commissioner, 231 Fed. 2d 121 (3rd Cir. 1956); Scholl v. Felmont Oil Corp., 327 Fed. 2d 697 (6th Cir. 1964); Miller v. Johnson, Inc., 191 Va. 768, 62 S.E.2d 870 (1951).

In each of the following cases, the complaining party relied



upon a change of counsel immediately before trial as ground for a continuance: Miller v. Johnson, Inc., 191 Va. 768, 62 S.E.2d 870 (1951); Brunson v. Hamilton Ridge Lumber Co., 122 S.C. 436, 115 S.E. 624 (1923); Berger v. Mantle, 18 Cal.App.2d 245, 63 Pac.2d 335 (1936).

In Hicks v. Bekins Moving & Storage Co., 115 Fed. 2d 406 (9th Cir. 1940), the complaining party was seeking to re-open a matter dismissal of which had been permitted without objection. In Andrews v. Hotel Sherman, 138 Fed. 2d 524 (7th Cir. 1943), the court held that the complaining party had not been prejudiced by the denial of a continuance. In Baltimore American Ins. Co. v. Pecos Mercantile Co., 122 Fed. 2d 143 (10th Cir. 1941), a litigant represented by two well known law firms was complaining of inadequate representation based upon confusion over who was to prepare the case. Inderbitzen v. Lane Hospital, 17 Cal.App. 2d 103, 61 Pac.2d 514 (1936) involved a case which had apparently been delayed for eight years since it had been at issue. In Everts v. Will S. Fawcett Co., 3 Cal.App.2d 261, 38 Pac.2d 868 (1934), the defendant based its request for a continuance upon a desire to seek further evidence, the nature of which it was uncertain, from plaintiff.

Respondent's remaining authorities stand only for principles sufficiently general to be beyond dispute.

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### CONCLUSION

It appears from the record that the discretion of the Tax Court was not "directed by the reason and conscience of the judge to a just result," Langnes v. Green, 282 U.S. 531, 541 (1931); petitioner was



therefore deprived of an essential step in the judicial process and the case should be reversed and sent back to the Tax Court with instruction that it be set for trial.

Dated, Oakland, California,

April 5, 1966

Respectfully submitted,

JOHNSTON & PLATT

By ROBERT D. PLATT  
Attorneys for Petitioner

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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ROBERT D. PLATT  
Attorney for Petitioner





## APPENDIX

### Definitions of "Discretion"

1. The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.

Bailey v. Taaffe, 29 Cal. 423, 424  
(1866). (Cited on pages 6 and 8 of  
petitioner's Opening Brief.)

2. The Supreme Judicial Court of Massachusetts defined the term in Davis v. Boston Elevated Ry. Co., (1920) 235 Mass. 482 [126 N.E. 841, 843], as follows: "By such expression is implied absence of arbitrary determination, capricious disposition, or whimsical thinking. An exhibition of ungoverned will, or a manifestation of unbridled power is not the use of discretion. The word imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just."

In his work, "The Nature of the Judicial Process," Justice Cardozo wrote (p. 141): "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all



conscience is the field of discretion that remains." Certainly a decision rendered in disregard of fundamental facts upon which the parties were relying or based on facts not adduced at the trial, and unregulated by those principles which are recognized as being inherent in the true concept of judicial discretion would not be a judicial decision in the true sence.

Gossman v. Gossman, 52 Cal. App. 2d 184,  
195-196 (1942).



STATE OF CALIFORNIA    )  
                              )  
COUNTY OF ALAMEDA    )    ss.

ROBERT D. PLATT, being first duly sworn, deposes and says:

That he is a citizen of the United States, over the age of 18 and not a party to the within cause or proceeding; that he is employed in Alameda County and that his business address is 833 First Western Building, Oakland, California; that on April 5, 1966 he served three true copies of the attached Petitioner's Reply Brief by placing said copies in an envelope addressed to: RICHARD M. ROBERTS, Acting Assistant Attorney General, Tax Division, United States Department of Justice, Washington, D.C. 20530, which envelope was then sealed and postage fully prepaid thereon, and thereafter, on said date, deposited in the United States mail at Oakland, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

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ROBERT D. PLATT

Subscribed and sworn to before me  
this 5th day of April, 1966.

---

SHARON D. GERRITS  
Notary Public in and for said  
County and State  
My Commission Expires: 12/16/68









